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Supreme Court of the United States

October Term, 1994

NATIONAL AMUSEMENTS, INC.,

Petitioner,

vs.

TOWN OF DEDHAM,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the constitutionality of an alleged "time-place-and-manner" municipal by-law banning First Amendment activity (here, both the right to show and to see "midnight movies") be sustained *on summary judgment,* when there is record evidence that the alleged "substantial governmental interest" to be served was based upon sham citizen complaints that masked racial animus against midnight movie patrons who were largely African American?

2. Can the First Circuit's affirmance of summary judgment be squared with (a) this Court's ruling in *Turner Broadcasting System, Inc. v. Federal Communications Commission,* __ U.S. __, 114 S. Ct. 2445, 2471 (1994) (quoting *Edenfield v. Fane,* __ U.S. __, 113 S. Ct. 1792, 1798-99 (1993)), that when

> the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." [citation omitted]. It must demonstrate that the recited harms are *real, not merely conjectural,* and that the regulation will in fact alleviate these harms in a direct and material way?

(Emphasis supplied); or (b) the Ninth Circuit decision in *Acorn Investments, Inc. v. Seattle,* 887 F.2d 219 (9th Cir. 1989) and the Eighth Circuit decision in *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir. 1985), requiring government to produce both relevant and reliable evidence that protected speech *actually* causes alleged harms in the form of adverse "secondary effects"?

3. Is a municipal "time-place-and-manner" by-law imposing restrictions on all licensed entertainment unconstitutionally overbroad, because it reaches many forms of entertainment that do not even arguably produce the adverse "secondary effects" allegedly caused by the midnight movies it was intended to proscribe?

PARTIES TO THE PROCEEDING

Petitioner is National Amusements, Inc., a Maryland corporation, which owns a majority of the voting shares of Viacom, Inc., and approximately one-fourth of the shares of WMS Industries, both of which are publicly traded corporations. Respondent is the Town of Dedham, a Massachusetts municipal corporation.

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Petitioner, National Amusements, Inc., d/b/a Showcase Cinemas in Dedham, Massachusetts, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit affirming summary judgment for respondent, Town of Dedham ("Dedham"), in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 1a-38a) is reported at 43 F.3d 731 (1st Cir. 1995); and the Opinion of the District Court (App., *infra*, 39a-59a) is reported at 846 F. Supp. 1023 (D. Mass. 1994).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on January 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND MUNICIPAL BY-LAWS INVOLVED

This case involves the constitutional validity of a Dedham by-law, Chapter XIII, § 57, which provides that:

> Unless otherwise restricted, no holder of a license issued by the Town of Dedham pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.

(App., *infra*, 60a).

Massachusetts General Laws, Chapter 140, authorizes municipalities, in general, to grant and revoke licenses for amusement devices (§ 177A); theatrical exhibitions, public shows and public amusements for which an admission fee is charged (§ 181); and concerts, dances, cabarets and public shows conducted on premises licensed for sale of food, beverages or alcohol (§ 183A). (App., *infra,* 61a-69a).

The United States Constitution's First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ."; and the Constitution's Fourteenth Amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty or property without due process of law. . . ." (App., *infra,* 70a-72a).

STATEMENT OF THE CASE

A. Introduction

In November 1989 the Town of Dedham, a suburb of Boston, adopted a by-law, Chap. XIII, § 57, specifically designed to ban altogether the commercial exhibition of motion pictures after 1 a.m. (R. A1092, A1146, A1159, A1393, A1872, A2212 and A2678).[1]

Petitioner, National Amusements, Inc., owns and operates a cinema complex in Dedham under the name Showcase Cinemas that exhibits popular films to the public at large, including late shows beginning around midnight on Friday and Saturday evenings.[2] It is undisputed that Dedham's by-law was passed to

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1. All citations to the Record ("R.") refer to the Appendix filed with the Court of Appeals.

2. Petitioner, National Amusements, Inc., is referred to hereinafter as "Showcase Cinemas" or simply "Showcase".

stop Showcase from exhibiting these popular "midnight movies". Showcase sought judicial relief from Dedham's prohibitive by-law on the ground that it violated the First Amendment. Among other First Amendment infirmities, the record developed during discovery exposed Dedham's alleged "purpose" in enacting the by-law — the preservation of late-hour "peace and tranquility" — as a pretext to keep midnight movie patrons who are predominantly African Americans out of town late at night.[3] When Dedham citizens who had complained of late night disturbances were put to the test of testimony *under oath,* their complaints were recanted or materially modified. *See infra* pp. 7-9. Further, an examination of contemporaneous statements by Selectmen and others strongly points to a racially oriented and discriminatory purpose for the by-law. *See infra* pp. 6-7.

In the face of this record, heavily laden with factual conflict as to the real purpose of Dedham's by-law, the District Court sustained its constitutionality *on summary judgment.* The United States Court of Appeals for the First Circuit then affirmed summary judgment in an opinion that defers to Dedham's legislative "judgment" based on citizen complaints (however flimsy), constabulary "concerns" (however unspecified and unrelated to the cinema) and so-called "commonsense".

This summary judgment calls for an equally summary reversal in this Court, if only because, on this record, it is impossible to find that no factual dispute existed. More importantly, the Court of Appeals' decision licenses a judicial approach to summary judgment in First Amendment cases that imperils First Amendment freedom when the citizenry sets out to ban speech — precisely the setting that inspired the protections

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3. An independent statistical survey showed that the midnight movie audience was predominantly African American (approximately 80%) as contrasted with a predominantly white audience (approximately 75%) at earlier movie showings. (R. A2602).

against majority abuse embodied in the Bill of Rights. Whether Dedham's abridgment of those freedoms was justifiable in service of a "substantial governmental interest", or just a poorly disguised triumph for local prejudice, is a serious fact issue wholly inappropriate for resolution on summary judgment.[4]

B. Overview of the Facts

In Boston, where many movie houses have closed, people who live in urban neighborhoods travel to outlying suburbs, like Dedham, to see motion pictures. It is also sadly true that when large numbers of African Americans enter a predominantly white suburb, they create a perception of potential disturbance or crime even when neither occurs. When this migration occurs late at night, its tendency to generate fear is that much greater. The record in this case reflects that it was just such fear that caused Dedham to ban the Showcase "midnight movies" which were attended largely by African American patrons. (R. A2602).

In 1978, six years after constructing its cinema complex in Dedham, Showcase began exhibiting midnight movies on Fridays and Saturdays. Showcase has always shown popular films, rated, G, PG, PG-13 and R (R. A1595, A2634 and A2694), at these performances, which started around 11:30 p.m. and ended between 1 a.m. and 2:30 a.m. In 1988, *ten years after* the midnight movies began, one John Washek bought a house directly across from the Showcase cinema complex. Washek was opposed to the efforts of Showcase to expand its cinema complex and brought suit to stop the expansion. As part of his campaign against Showcase, Washek solicited his neighbors to sign a petition to ban the midnight movies. (R. A1003-04, and A1717).

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4. Racial animus can have conscious as well as unconscious roots, but either way it undermines the credibility of Dedham's purported government purpose and adversely impacts racial minorities attending the movies.

The race issue immediately reared its head as Washek stirred up the neighborhood with allegations that "there were a lot of serious crime issues, riots, that were stated as *race* riots at the Cinema." (R. A1702). He even took the extraordinary step of preparing a flyer falsely insinuating that the midnight movie patrons had caused crime all over Dedham. (R. A1706-09).[5]

When town Selectmen asked about this, Dedham Police Chief Teehan reported that there were numerous incidents along Route 1, the main thoroughfare, after the midnight movies let out. But he failed to mention that only five of these incidents (four fender benders and one assault, wherein Showcase cinema patron was the victim, not the culprit) occurred after midnight on Fridays or Saturdays; and he could not attribute any of these five incidents to midnight movie patrons.[6]

Without any apparent further inquiry, investigation, or independent study, the Dedham Selectmen prepared the predecessor of the by-law challenged herein and placed it on the warrant for Dedham's Annual Town Meeting.

Only then did the Board of Selectmen invite neighbors of Showcase to air their concerns about the cinema complex and suggest that they, together with the Chief of Police, meet with a

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5. Although Washek conducted a review of the Dedham Police "blotter" to prepare a summary of "incidents" reported after midnight, his summary did not show any incidents within the neighborhood adjacent to the cinema complex or any incidents directly attributable to midnight movie patrons. (R. A1707, A1931 and A2096).

6. On deposition, when Chief Teehan was asked about crimes surrounding the Showcase cinema complex he observed that, while there was a "perception" among neighborhood residents that it was less safe because of the theaters, "the statistics I've reviewed would indicate that we haven't had, in those particular neighborhoods at this time, any serious crimes." (R. A1554).

Showcase Vice-President to try to resolve the concerns. (R. A1007 and A2253). A series of meetings ultimately led to a program successfully implemented by Showcase to address the neighbors' concerns, even though they did *not* relate in any way to the midnight movies.[7] (R. A1861).

Notwithstanding Showcase's successful program to resolve neighborhood concerns, at Dedham's Annual Town Meeting in April 1989, the Dedham Selectmen pressed for adoption of a by-law to ban the midnight movies. During the Meeting, thinly disguised racial slurs became common currency, as Selectmen and citizens reviled Showcase in their discussions of the proposed by-law. The alleged midnight movie trouble-makers were euphemistically described as coming from "out of town." Selectman Hoell referred to them as "nice little out-of-towners" and the "undesirable element that's attracted by General [sic] Cinema activity." (R. A1903-04). Selectwoman Kehoe referred to "these young kids, who don't even live in Dedham." (R. A1873). And later, Selectman Taurasi called them "kids from different neighborhoods."[8]

In this context, it is a demonstrably reasonable inference that these references to foreign elements in Dedham were just code words to mask racial biases. Movie patrons do not carry signs announcing where they live. Coupled with the statistical truth that most patrons of the "midnight movies" were African American, these tell-tale phrases describing the patrons as

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7. In a stroke that is as wrong-headed as it is ironic, the Court of Appeals read petitioner's willingness to address citizen concerns as a confession that the midnight movies actually caused problems.

8. Quoted in *Boston Globe*, March 29, 1991: "For Most of Boston, The Screen Has Gone Dark Two-Thirds Of The City's Residents Cannot See A Movie In Their Own Neighborhood."

"different" could only reflect a *visible* difference like skin color, which would be conspicuous in predominantly white Dedham.

Moreover, when the very citizens who charged midnight movie patrons with creating crime and other disturbances were examined on deposition, their charges withered away. For example, one resident complained at Town Meeting that "sixteen windows were smashed at Papa Gino's Plaza," but he admitted when *under oath* that there was no evidence that midnight movie patrons had smashed the windows or committed any other crimes in Dedham. (R. A449-450 and A1473-74).

Another damning, but equally misleading complaint, was voiced at Town Meeting by Selectwoman Kehoe who charged that "because of the attraction at [the Showcase] corner we have had fences that have been put up by residents destroyed, graffiti written all over them, rocks thrown through windows of residents in the area." (R. A480). But testifying under oath, the Selectwoman had to admit that she did not know whether these offenses were committed by cinema patrons or even when they occurred other than "after dark." (R. A1205-06).

Selectman Hoell poisoned the atmosphere at Town Meeting further by falsely stating that midnight movie patrons had committed serious criminal acts:

> Despite Mr. Reid's eloquence, he certainly doesn't live in the neighborhood. He has not come out of that theater, started up his vehicle and found all four wheels drop off the car. He's not had a fifteen or sixteen year old youngster up in that particular area on an extremely cold night, two of them, stripped of their jackets.

(R. A474-75). As often happened in this case, this accusation was completely deflated at deposition when the Selectman admitted under oath that he had no evidence to connect the culprits with midnight movie patrons. (R. A1141).[9]

Complaints about traffic, noise and trash proved equally insubstantial. Under oath in deposition one complainant, who had asked Town Meeting to "imagine" 2,000 cars "coming out of the theater burning rubber, screaming down the highway and raising general hell", confessed that there was no basis other than his inflated imagination for stating that 2,000 cars might come out of the theater parking lot at once.[10]

Likewise, no witness ever specifically attributed litter to any midnight movie patron. (*See* R. A1723).[11] And, to the extent that patrons were said to produce noise coming out of the midnight movies and cutting through the neighborhood, that was eliminated *without curtailing speech* by posting a "Dead End"

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9. As to a so-called "lug-nut" incident, Showcase proffered evidence showing that it actually occurred on Friday, January 27, 1989, at 9:45 p.m. (R. A1867), almost two hours *before* the midnight movies even began; and as to the "jacket" incident, Showcase proffered evidence showing that it occurred on Sunday, December 11, 1988, at 11:50 p.m., a full day *after* the exhibition of midnight movies. (R. A2096).

10. Showcase proffered evidence that in 1988-89, for example, about 350 patrons attended the midnight movies per night, which strongly suggests there were no more than 350 cars, and probably far fewer, exiting the cinema parking lot late at night. (R. A2213).

11. Moreover, a city's interest in preventing litter has been held insufficiently strong to justify curbing First Amendment rights, given less restrictive alternatives including punishing those who do it. *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

sign opposite the cinema parking lot at the roadway entrance to the adjacent neighborhood area. (R. A1009).[12]

Nonetheless, at the Annual Town Meeting the predecessor to the ordinance in question here was adopted. Subsequently, the Massachusetts Attorney General found this predecessor by-law unconstitutional, because it distinguished between different types of entertainment and therefore lacked content neutrality.[13] Undaunted, the Selectmen revised the by-law in an effort to remove any suggestion of content based regulation and placed the revised by-law on the warrant for a Special Town Meeting in November 1989, where it was duly adopted.[14]

Although Dedham's by-law purports to ban all licensed entertainment in Dedham between 1 a.m. and 6 a.m., no entities other than Showcase were actually operating past 1 a.m. and, as the members of the Board of Selectmen acknowledged at meetings and in deposition, its purpose was "to bring about the passage of a bylaw that would ban the midnight movies." (R. A1092, A1146, A1159, A1393, A1872, A2212 and A2678).

Accordingly, Showcase brought suit to enjoin enforcement

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12. Indeed, Dedham's own police witnesses disputed that the midnight movie patrons were loud or boisterous as compared with those who attended movies earlier in the evening. (R. A1059-60 and A1113-14).

13. This predecessor ordinance banning licensed entertainment between 12:30 a.m. and 6 a.m. excepted ballroom dance halls from its proscription, because Dedham Selectmen did not want to eliminate "healthy entertainment" late at night. (R. 2010).

14. The parties agreed to suspend the effect of the by-law *pendente lite*. That suspension was in effect for 4 years and there is nothing in the record to suggest that Dedham is any the worse for it.

of the Dedham by-law. However, the District Court granted summary judgment for Dedham upholding the by-law's constitutional validity against the claim that it cannot meet the demands of "intermediate scrutiny" under the First and Fourteenth Amendments.[15]

The Court of Appeals mocked Showcase's contention that there was no substantial evidence of a "significant governmental purpose" to support the by-law. The court did not even acknowledge the existence of evidence, undeniably present in the record, that creates a factual conflict on that point. Belittling its own recitation of the elements of summary judgment as a "mantra" and Showcase as "merchants of conjecture", the Court of Appeals simply concluded, largely on the basis of say-so, that Dedham's by-law passed the "governmental purpose test." (App., *infra,* 22a).

First, the Court of Appeals observed that Dedham had stated its enacting purpose as the preservation of "peace and tranquility during the late evening hours." (App., *infra,* 18a). It then held that "such an interest, *in the abstract,* suffices to justify a content-neutral restriction on protected speech. . . ." (App., *infra,* 18a) (emphasis supplied). On that reasoning, the court said it need only decide whether Dedham's by-law was based on good reason, without regard to the facts underlying its purpose or passage. (App., *infra,* 22a n.10).

Consistently, the Court of Appeals did not point to a single instance of crime, litter, or noise. Instead, it focused on "the abstract" and held that a legislature can rely upon " 'whatever

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15. Although Showcase contends that the by-law is not content-neutral and thus calls for the highest level of scrutiny, for purposes of this petition it is enough to examine the by-law under "intermediate scrutiny", for it cannot pass muster even under that lesser standard.

evidence it reasonably believes to be relevant to the problem' at hand."[16] (App., *infra*, 21a) Here, the Court of Appeals held, Dedham could properly rely on "citizen complaints" without confirming any of them, "constabulary concern" about "a pattern of incidents" even though these incidents were only speculatively tied to the midnight movies, and "a commonsense realization" that the "placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles. . . ." (App., *infra*, 22a).[17]

Finally, the Court of Appeals simply disparaged verbal evidence of racial animus by dismissing the suspect language as "at worst ambiguous" and "too much of a stretch" to require trial. (App., *infra*, 24a, 26a).

Put otherwise, the Court of Appeals affirmed summary judgment by: (1) rejecting on its own the deposition testimony that had undermined both the relevance of citizen complaints and alleged connections between disturbances and the midnight movies; (2) resorting to so-called "common sense"; and (3) precluding any opportunity for a trial to determine whether "out of town" was nothing other than a cloak for racial fear.

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16. On the other hand, the court seemed to acknowledge that "governmental interest woven exclusively out of the gossamer threads of speculation and surmise cannot be termed substantial. . . ." But it never explained or demonstrated how a court goes about determining whether an alleged governmental purpose is no more than theoretical. This would have been a perfect case in which to illustrate that distinction.

17. The Showcase cinema complex is located in a commercially zoned area of Dedham at the approximate junctions of Route 1, a busy thoroughfare, and Interstate 95, a major highway.

REASONS FOR GRANTING THE WRIT

I.

THE SUMMARY JUDGMENT SHOULD BE REVERSED *PER CURIAM* BECAUSE THE TRIAL COURT IMPROPERLY RESOLVED DISPUTED ISSUES OF FACT RELEVANT TO WHETHER THERE WAS A "SUBSTANTIAL GOVERNMENTAL INTEREST" TO JUSTIFY THE ABROGATION OF FIRST AMENDMENT FREEDOM.

To defend a law that abridges the freedom of speech, government must show that the law in question "furthers an important or substantial government interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1987). *See also, Metromedia v. San Diego*, 453 U.S. 490, 507 (1981). This is a fact issue. Accordingly, where as here, Showcase has brought the facts into dispute by marshalling its own conflicting evidence, the issue cannot be resolved on summary judgment, but must be left for trial.

How does one bring the facts into dispute on the "governmental interest" issue? As it was done here, by cross-examining the government's witnesses in deposition to show that their "evidence" of an alleged evil is flimsy at best, and by presenting other evidence to show that an illegitimate purpose lies behind the enactment. These avenues of proof give expression to the law as this Court has recently articulated it. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S. Ct. 2445, 2471 (1994) (government must show that the legislature has drawn reasonable inferences based upon "substantial" evidence); *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798-99 (1993)

(government must demonstrate that the evils are "real" and that its restrictive law will materially diminish them).[18]

In sustaining summary judgment, the Court of Appeals essentially defied *Turner* and *Edenfield* by failing to exercise its responsibility to ensure that the government's alleged "significant purpose" is put to the test — here, by trial of the factual conflict. Instead, in the face of a record that seriously undermined the government's showing, the Court apparently buoyed up the government's case by what amounts to little more than *ipse dixit* and thereby denied defendants their right to trial on an important free speech question.

First, the court announced that Dedham's mere articulation that it enacted the ordinance to "preserve peace and tranquility" is sufficient to justify the by-law, assuming the other requirements of intermediate scrutiny are met. But on that theory any First Amendment activity is subject to shut-down upon the assertion by government of a plausible interest in peace and tranquility. To take the classic example, there is nothing that can threaten peace and tranquility more than an unpopular speech by an unpopular speaker. However, it is precisely to protect the unpopular that the First Amendment imposes tests which a law must satisfy even at the level of "intermediate scrutiny." And it is not a long step from the unpopular speaker to the unpopular group whose First Amendment right to see a movie late at night is eliminated by a

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18. Even before *Turner* and *Edenfield*, which were virtually ignored by the Court of Appeals, there was a large catalog of cases applying these standards to test the substantiality of a proffered government interest and the utility of its allegedly remedial law. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Leverett v. Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Kuzinich v. Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Basiardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981).

ban "to get the trouble out of town earlier," (R. A447), enacted on the pretext that it will "preserve peace and tranquility."

Although the court below paid lip-service to the notion that an alleged governmental purpose based on "speculation and surmise cannot be termed substantial," it did nothing to ensure that speculation and surmise had not carried the day in Dedham. (App., *infra,* 19a). Stating with conspicuous rhetorical flourish that this record consists of "sturdier stuff" which "tells a story that strongly supports Dedham's stated purpose," the court said that it would "canvass certain key pieces of evidence" to show that.[19] (App., *infra,* 19a).

But it did nothing of the kind. Instead, it placed one-sided reliance upon citizen complaints without noting that they had been seriously undermined on deposition by admissions from the citizens themselves, or that their complaints did not even marginally relate to the midnight movies or midnight movie patrons.

Consistently, the court trivialized the total failure of Dedham officials to make any independent investigation to determine whether the citizen complaints had substance, and, if so, any relevance to the midnight movies. The court's technique here was to set up straw-man arguments Showcase never made, for it has never contended that a municipality cannot act unless it "conducts an independent investigation and corroborates each incident" or that a legislature cannot act "without acquiring irrefutable proof."[20] (App., *infra,* 21a). But the case law does

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19. Even if the government's evidence were strong, however, trial is still necessary to decide a factual issue when there is conflicting evidence.

20. The extreme to which the court below went in stuffing the man with straw is manifest in its refutation of a claim no rational person would ever have

(Cont'd)

establish that some verification of the allegedly justifying facts is at least important, and perhaps required in some cases, to ensure that the government's alleged purpose is not mere "speculation and surmise", or worse, a pretext for implementing an illegal aim. *Edenfield v. Fane, supra; Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Board of Education v. Pico*, 457 U.S. 853, 874-75 (1982).[21] The absence of any independent verification is a factor of particular significance in a context like this one where cross-examination of the government witnesses has demonstrated the infirmity of citizen complaints: Given the contradiction in the relevant citizen's testimony, was it really patrons of the midnight movies who broke Papa Gino's windows? Took wheels off cars? Committed crimes elsewhere in Dedham?

Petitioner provided evidence that the answer to each of these questions was "no". At the very least, in light of the conflicting evidence, these were questions to be decided at trial, not on summary judgment, because such answers are critical to an overall determination of whether Dedham's by-law abridging speech served a substantial governmental interest or was instead an illegitimate indulgence of racial fear.

The Court of Appeals was no less unmindful of this Court's rulings in relying upon a so-called "constabulary concern with a

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(Cont'd)
made: "In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels." (App., *infra*, 21a).

21. Both the Second and Eighth Circuits have found that government failed to meet its burden when it did not provide a study supporting legislative restrictions on speech. *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 112 n.6 (2nd Cir. 1985) (no record of professional analysis of impact of adult book store on urban life); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661 (8th Cir. 1981) (same).

pattern of incidents . . . believed to have occurred in connection with the exhibition of midnight movies." (App., *infra*, 22a). Typically, its opinion never states what those concerns were, much less substantiates them or ties them into the late-night showings. This omission is particularly telling in light of Police Chief Teehan's inability to provide support to show that any disturbance was caused by a midnight movie patron, and in light of the evidence supplied by Showcase that few disturbances took place at a time that was close to the showing of the midnight movies.

In this respect, the Court of Appeals' decision is flatly in conflict with the approach taken by the Ninth and Eleventh Circuits. *Acorn Investments, Inc. v. Seattle*, 887 F.2d 219, 224 (9th Cir. 1989); *Krueger v. Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985) (constabulary concerns not enough where evidence of linkage to disturbance is tenuous). *See also, People v. Glaze*, 614 P.2d 291, 296 (Cal. 1980) (to support constabulary concerns, city must show criminal activity at picture arcades particularly acute between 2 a.m. and 9 a.m.).

But as tell-tale as any of the arguments deployed by the Court of Appeals is its final reliance upon a common last resort — "commonsense." The court credited Dedham with "a commonsense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles. . . ." (App., *infra*, 22a).

Any such "realization" cannot be regarded as more than marginally relevant to an assessment of the substantiality of an alleged governmental interest in enacting a by-law otherwise offensive to the First Amendment. If it were, any late night First Amendment activity with an appreciable public facet is vulnerable to a ban. The application of so-called commonsense to

the analysis is ultimately little more than a license to "assume" a threat to peace and tranquility — the very sort of assumption (speculation and conjecture) that this Court's cases condemn when First Amendment freedoms are at issue. *Los Angeles v. Preferred Communication, Inc.*, 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (internal quotation marks and citation omitted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.' ") (citation omitted).[22]

Finally, in light of the substantial evidence that citizen complaints were either groundless or exaggerated, an inference arises that the real object of the Dedham by-law was other than met the eye.[23] That inference takes on strength from the verbal

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22. Here, the Dedham by-law is particularly capricious because it not only bans Showcase's midnight movies, but all other forms of licensed entertainment in Dedham, including some forms of entertainment, *e.g.*, a piano player at a bar or harpist at a hotel function room, which could not even arguably produce the adverse "secondary effects" that Dedham is ostensibly concerned about. Thus, the by-law proscribes a substantial amount of clearly protected First Amendment activity and is unconstitutionally overbroad. *Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (overbreadth is substantial where it prohibits all protected expression and does not merely regulate expressive activity that might create problems); *Boston v. Back Bay Cultural Association, Inc.*, 418 Mass. 175, 183 (1994).

23. In *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993), this Court ruled that when an employer's reasons for hiring or firing lack credibility and yield a "suspicion of mendacity" they "suffice to show intentional [racial] discrimination." An inference of racial motivation is equally rational here, not only from the failure to sustain the credibility of citizen complaints, but from the suspect language complainants used to describe people from "out of town." *Id.* at 2749.

evidence that racial fear was at play. In this arena, too, the Court of Appeals should not have acted summarily, for whether the alleged racial slurs were "at worst ambiguous" should have been left for trial. Instead, the Court of Appeals simply declared them "insufficient to raise an inference of racial animus." Another *ipse dixit*.

In sum, the damage done on deposition to the credibility of citizen complaints of disturbance and allegedly related police concerns, coupled with the inference that Dedham had an illicit motive in enacting its late-night by-law, presented a case on summary judgment awash in factual conflict. That was particularly so with regard to whether Dedham had made its case that the midnight movies presented a real threat to civic order, or alternatively whether petitioner's showing that the Dedham by-law was evidence born of racial fear should be credited. Accordingly, under fundamental principles of summary judgment law, this Court should reverse summary judgment, *per curiam*. S. Ct. R. 16.1.

II.

IF *PER CURIAM* REVERSAL IS NOT WARRANTED, THIS COURT SHOULD GRANT THE WRIT TO REVIEW THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISIONS; AND DECISIONS IN THE NINTH AND ELEVENTH CIRCUITS.

As noted earlier, the decision below conflicts directly with decisions of this Court, *Turner Broadcasting System, Inc. v. Federal Communications Commission, supra* at p. 12, and *Edenfield v. Fane, supra* at p. 12, that require substantial evidence, not merely assumption or commonsense, to support the constitutionality of a restriction on speech. The same conflict

exists between the decision below and the decisions by the Ninth Circuit in *Acorn Investments, Inc. v. Seattle, supra* at p. 16; and the Eleventh Circuit in *Krueger v. Pensacola, supra* at p. 16.

These cases, and the conflicts they present, raise fundamental questions that merit review in this Court: When government alleges a "substantial purpose" in support of a restriction on speech that calls for judicial scrutiny at an "intermediate level" what kind of evidence must it adduce? How much evidence must be proffered? When is that evidence conclusive so as to warrant summary judgment on that issue?

CONCLUSION

If the "very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), the summary judgment below cannot stand. It rests on virtually total deference to a town legislature, at times in the name of "citizen complaints," at times under the banner of "commonsense."

The Town Meeting is a venerable New England institution, but it does not entail legislative hearings or findings. Those who attend can voice their views at will, argue, advocate, dissemble or denigrate — without checks or balances — to achieve personal, social, or political goals. Whatever the democratic virtue of this institution, it carries with it a real threat to First Amendment freedoms when unpopular exercise of those freedoms is at issue. Here, Dedham's Town Meeting was nothing short of a political melee, where Selectmen denounced midnight movies as "unhealthy"; where angry speakers falsely accused petitioner of creating disturbances all over Dedham; and where citizens

shamelessly referred to the late-show patrons as "antisocial" and "trouble".

That is why citizen complaints, unless tested by cross-examination, or verified by independent study, cannot provide an "adequate reason" for restricting speech. Indeed, constitutional scrutiny exists just to put such majoritarian outcries to the test. And that is why, even in more formal legislative settings, this Court has always insisted that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). *See also, NAACP v. Claiborn Hardware Co.*, 458 U.S. 886, 915 (1982).

The vice of unwarranted deference is compounded in a case like this because there was evidence clearly undermining the relevance and credibility of the citizen complaints that allegedly led to Dedham's by-law, not to mention evidence that the by-law was the product of racial bias. In granting summary judgment, both courts below abused this Court's case law and set themselves in conflict with the law in other Circuits. Thus, this Court should intervene by granting the writ of certiorari and remanding this case to the district court for trial.

Respectfully submitted,

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APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 4, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1176

NATIONAL AMUSEMENTS, INC.,
Plaintiff, Appellant,

v.

TOWN OF DEDHAM,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

Theodore E. Dinsmoor, with whom *Finnegan and Stanzler, P.C.*, *Philip Y. Brown*, *Grant Schwartz & Brown*, *Tad Jankowski*, and *Lori Wiechelt* were on brief, for appellant

Joyce Frank, with whom *Kopelman and Paige, P.C.* was on brief, for appellee

Appendix A

January 4, 1995

Selya, *Circuit Judge.* This appeal presents a medley of constitutional questions driven by the passage of a municipal by-law that effectively prohibits the exhibition of motion pictures at the town's only theatre between the hours of 1:00 a.m. and 6:00 a.m. After careful consideration of appellant's asseverational array, we affirm the district court's entry of summary judgment in the municipality's favor.

I. BACKGROUND

Plaintiff-appellant, National Amusements, Inc., owns and operates Showcase Cinemas (Showcase), a complex containing 12 theaters located on Route 1 in Dedham, Massachusetts. In 1978, appellant began exhibiting "midnight movies" on Friday and Saturday nights. These performances started between 11:30 p.m. and 12:30 a.m., and ended between 1:00 a.m. and 2:30 a.m.

On January 12, 1989, at a meeting of the Board of Selectmen (Dedham's governing body), Selectman Kehoe raised the issue of secondary effects, expressing particular concern over purported traffic and security problems associated with Showcase's operation of its business. At a selectmen's meeting the following week, after another selectman reported that he had received complaints about disruptions connected with appellant's exhibition of midnight movies, the Board placed a proposed by-law amendment on the warrant for the forthcoming annual Town Meeting.[1] The text of this proposal denominated "Article 40," read in pertinent part:

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1. The venerable institution of the town meeting is perhaps more celebrated in New England than elsewhere. The colonial government of Massachusetts first (Cont'd)

Appendix A

> To see if the Town will vote to amend Chapter XIII of the Town By-Laws by adding the following new section:
>
> Section 42B - No holder of an entertainment license for theatrical exhibition, public show, public amusement, concert, dance or exhibition . . . shall conduct business between the hours of 12 midnight and 6:00 a.m.

The Board also sent a letter to William Towey, appellant's senior vice-president, memorializing its "concern about the problems generating from the Showcase Cinemas after the weekend late shows," and indicating that the Board "would like to discuss this situation. . . ." On February 2, Towey and approximately 30 interested residents met with the selectmen and discussed matters related to the exhibition of midnight movies.

In response to the residents' articulated concerns, Towey conferred with various townsfolk, including the police chief. Thereafter, appellant agreed to undertake, at its expense, a variety of measures designed to enhance security, reduce noise levels,

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(Cont'd)
passed enabling legislation, entitled the "Town Act", in 1636. A 1647 version of the Town Act gave municipalities the "power to make such laws and Constitutions as may concern the welfare of their Town. Provided they be not of a criminal but only of a prudential nature . . . and not repugnant to the publick Laws." 1647 Mass. Town Act, *The Laws and Liberties of Massachusetts* 50 (1648 & reprint 1929). While Dedham's present-day Town Meeting operates under the aegis of the Home Rule Amendment to the Massachusetts Constitution, *see* Mass. Const. amend. art. 2, §§ 1-9, *amended by* Mass. Const. amend. art. 89; *see also Bloom v. City of Worcester*, 293 N.E.2d 268, 274-75 (Mass. 1973), it, too, possesses lawmaking capacity, *see* Mass. Const. amend. art. 2, § 6.

control traffic, and ameliorate the problem of litter. Despite these concessions, the voters approved Article 40 at a Town Meeting held on April 10, 1989 (first amending it to exempt ballroom dancing and to change the closing time to 12:30 a.m.).

Under the Massachusetts scheme, municipal by-laws cannot take effect without the imprimatur of the Attorney General of the Commonwealth of Massachusetts. *See* Mass. Gen. L. ch. 40, § 32. The Attorney General refused to sanction Article 40 on the ground that the proposed amendment, by distinguishing ballroom dancing from other forms of dance, was not content-neutral and was, therefore, unconstitutional.

Undaunted, the Board of Selectmen proposed a neoteric amendment, Article 4, for inclusion on the next Town Meeting warrant. Article 4 provided in pertinent part:

> To see if the Town will vote to amend Chapter XIII of the Revised By-Laws of the Town of Dedham, entitled "Police Regulations" by adding a new section at the end thereof, as follows: Section *57.*
>
> Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.[2]

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2. The state laws cited in Article 4 authorize municipalities, in general, to grant and revoke licenses for amusement devices, concerts, dances, exhibitions, and public shows for which an admission fee is charged.

Appendix A

The voters adopted Article 4 at a special Town Meeting held on November 6, 1989. The Attorney General approved it on February 8, 1990. On the day that Article 4 took effect, appellant sued, charging that the by-law violated its rights under both the federal and state constitutions.[3] Following pretrial discovery, Dedham successfully moved for summary judgment. *See National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023 (D. Mass. 1994). This appeal ensued.

II. THE SUMMARY JUDGMENT STANDARD

A federal court may grant summary judgment in a civil action "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court fleshed out this rule in a triology of cases decided in the 1985-86 term. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In general, these cases require that a party seeking summary judgment make a preliminary showing that no genuine issue of material fact exists. Once the movant has made this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue. *See Celotex*, 477 U.S. at 324.

To satisfy the criterion of trialworthiness, and thereby forestall summary judgment, an issue must be "genuine," that is, the evidence relevant to the issue, viewed in the light most

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3. Dedham agreed not to enforce the by-law against Showcase *pendente lite*. This stipulation remains in effect.

flattering to the party opposing the motion, *see Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989), must be sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side. *See Liberty Lobby*, 477 U.S. at 250; *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Trialworthiness necessitates "more than simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. As we have stated, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve . . . ." *Mack*, 871 F.2d at 181.

Trialworthiness requires not only a "genuine" issue but also an issue that involves a "material" fact. *See Liberty Lobby*, 477 U.S. at 248. In this context, the term "material" means that a fact has the capacity to sway the outcome of the litigation under the applicable law. *See id.; see also United States v. One Parcel of Real Property, Etc. (Great Harbor Neck, New Shoreham, R.I.)*, 960 F.2d 200, 204 (1st Cir. 1992). If the facts on which the nonmovant relies are not material, or if its evidence "is not significantly probative," *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted), *brevis* disposition becomes appropriate.

An order granting summary judgment engenders plenary review. *See Pagano v. Frank*, 983 F.2d 343, 347 (1st Cir. 1993). In conducting such review, we examine the summary judgment record in the light most friendly to the summary judgment loser, and we indulge all reasonable inferences in that party's favor. *See id.* Withal, we need not credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

III. THE FIRST AMENDMENT CLAIM

The heart of appellant's case is its multifaceted claim that the municipal by-law violates the First Amendment. We turn directly to that claim (relegating appellant's related overbreadth challenge to Part IV(C), *infra*).

A. Putting First Things First.

In the context of First Amendment challenges to government regulations that burden speech, the Supreme Court has identified two differing modes of analysis, or levels of scrutiny, that may come into play. Since entertainment constitutes a form of speech, fully protected by the First Amendment, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981), our initial task is to determine the appropriate level of judicial scrutiny that attaches to an analysis of Article 4. We begin this endeavor by mapping the choices and putting them into workable perspective.

Freedom of speech is among the most precious of our constitutional rights. Thus, courts have long recognized that, when governmental action places speech in special jeopardy, special protections must apply. For this reason, a court embarking on an inquiry into the constitutionality of governmental action will devote "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content." *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994); *accord Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is desirable in these circumstances because such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or

information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting,* 114 S. Ct. at 2458. Courts therefore treat content-based regulations as "presumptively invalid" under the First Amendment. *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538, 2542 (1992).

In contrast, regulations that burden speech, but that are unrelated to the speaker's viewpoint or to the content of the proscribed speech, are subject to a less taxing (but nonetheless meaningful) level of judicial scrutiny. This disparate treatment is justified because, on the whole, non-content-based regulations pose "a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting,* 114 S. Ct. at 2459. Phrased another way, since regulations that are not content-based portend less jeopardy for freedom of speech, the special prophylaxis that strict scrutiny ensures is less necessary.

This dichotomy has important practical ramifications for constitutional analysis as the applicable indices of constitutionality vary according to the level of scrutiny that attaches. Strict judicial scrutiny makes it less likely that any given regulation will clear the constitutional hurdle for, in its domain, the operative test is whether a regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231 (1987). Under ordinary First Amendment scrutiny — sometimes called "intermediate" scrutiny in recognition of the fact that *all* First Amendment scrutiny is more demanding than the "rational basis" standard that is often used to gauge the constitutionality of economic regulations, *see Turner Broadcasting,* 114 S. Ct. at 2458; *see also Madsen v. Women's Health Ctr., Inc.,* 114 S. Ct. 2516, 2537 (1994) (Scalia, J., concurring in part and dissenting in part) — the test is less

exacting in both the "ends" and "means" segments of the equation. Thus, where intermediate scrutiny pertains, restrictions on the time, place, or manner of protected expression "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

B. Identifying the Level of Scrutiny.

In light of these differing analytic modalities, it is unsurprising that many First Amendment battles over the constitutionality of government regulations start with a debate about what level of scrutiny is appropriate. The instant case is no exception. Here, appellant advances two main theses in support of its exhortation that Dedham's by-law must be subjected to strict scrutiny. First, it maintains that Article 4 is content-based. Second, it maintains that Article 4 impermissibly singles out, and thus targets, Showcase's exhibition of midnight movies. Neither thesis merits a passing grade.

1. Relationship to Content. Appellant's flagship claim portrays Article 4 as a content-based regulation. If sustainable, this characterization would require us to employ the most exacting scrutiny in evaluating the by-law's constitutionality. *See, e.g., Simon & Schuster,* 112 S. Ct. at 508. Be that as it may, we do not think that the characterization is apt.

The concept of what constitutes a content-based as opposed to a content-neutral regulation has proven protean in practice. The Court's cases teach that the "principal inquiry in determining

content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). Even a regulation that does not choose sides or otherwise convey disapproval of a particular message can run afoul of this dictate because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *accord Simon & Schuster*, 112 S. Ct. at 509. This does not mean, however, that the sovereign must steer away from content at all costs, or else risk strict scrutiny. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

The subject of our inquiry here seems at first blush to be the very model of a content-neutral regulation. Article 4, by its terms, does not demand reference to the content of the affected speech in order to determine if the ordinance applies; the only requisite reference is to an external characteristic: whether the activity is licensed under one of several particular sections of state law. Furthermore, nothing in the record suggests that Article 4 arose out of an effort to suppress some particular message communicated through Showcase's selection of motion pictures. In all events, any such forensic fizgig would be easily defused, because the midnight movies comprise exactly the same fare that appellant displays during the hours when the theater's operation is totally unaffected by Article 4.

Faced with so formidable a set of barriers, appellant hems and haws. In the end, it theorizes that Article 4 is content-based

because, while banning licensed activity in the early morning hours, the by-law leaves untouched other forms of expression, say, unlicensed entertainment, street demonstrations, public speeches, and candlelight vigils. In appellant's view, this distinction is driven by a value judgment — the town's conscious decision to place less worth on licensed entertainment than on unlicensed entertainment — and thus constitutes irrational discrimination between the secondary effects of prohibited and permitted forms of expression based solely on the charge of an admission fee." Appellant's Brief at 26.

As authority for this bold proposition, appellant cites *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). We do not believe that the case can carry the cargo that appellant piles upon it. In *Discovery Network*, a city, motivated by interests in both safety and aesthetics, imposed a categorical ban on the distribution, via newsrack, of "commercial handbills," but allowed the continued distribution of "newspapers" (containing primarily noncommercial speech). *Id.* at 1507-09. This policy clearly favored noncommercial speech over commercial speech, and, under it, "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id.* at 1516. On that understanding, the Court found the ban to be content-based. *See id.* at 1516-17. In so holding, the Justices, though acknowledging that the city had a legitimate interest in limiting the number of newsracks, gave short shrift to Cincinnati's suggestion that the regulation was content-neutral because it was born of a desire to combat certain distasteful secondary effects associated with newsracks. The Court contrasted the case with *Renton*, explaining that Cincinnati had failed to identify any "secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Id.* at 1517.

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Appellant's reliance on *Discovery Network* is mislaid. Whether Cincinnati's regulation applied to a particular newsrack was determined by necessary reference to the subject matter of the specific publications contained therein — a telltale harbinger of content-based regulation. Dedham's regulation is not of this ilk; Article 4 applies without reference to either the content of the entertainment or the communicative impact of any speech. Unlike in *Discovery Network*, the applicability determination is based solely on an external, content-neutral characteristic — the existence of an admission fee.

To rub salt in an open wound, appellant not only misapprehends the import of *Discovery Network*, but also overreads the Court's opinion. The case does not stand for the sweeping proposition that *any* differential treatment of speakers renders a regulation content-based. Instead, the Court's holding pivots on the conclusion that, though the city's underlying purpose in enacting the ordinance was proper, the differential treatment of speakers had no relationship to that underlying purpose.[4] *See id.* at 1517. Thus, *Discovery Network* establishes a much narrower proposition: that, even when a municipality passes an ordinance aimed solely at the secondary effects of protected speech (rather than at speech *per se* the ordinance may nevertheless be deemed content-based if the municipality differentiates between speakers *for reasons unrelated to the legitimate interest that prompted the regulation. Cf. Carey v. Brown*, 447 U.S. 455, 465 (1980) (sustaining challenge to statute permitting labor, but not nonlabor, picketing because "nothing in the content-based labor-nonlabor distinction ha[d] any bearing" on the state's legitimate interest in privacy).

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4. In this regard, it is interesting that, as applied, the regulation outlawed only 62 newsracks while permitting over 1,500 others to remain in service. *See Discovery Network*, 113 S. Ct. at 1510.

Here, Dedham's stated interest in enacting Article 4 is, and has been, to reduce the number of sources of potential noise and disturbance.[5] Such an objective is plainly within the office of municipal government. Accordingly, the relevant question reduces to whether Dedham has offered a neutral justification for the differential treatment that Article 4 accords to purveyors of licensed entertainment, on the one hand, and purveyors of unlicensed entertainment, on the other hand. On the facts of this case, the question requires us to ascertain whether there are any secondary effects attributable to licensed (commercial) amusements that distinguish them from the unlicensed (noncommercial) amusements that Dedham has left unregulated. *See Discovery Network*, 113 S. Ct. at 1517.

We answered the same question in a slightly different setting in *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981). There, several adult bookstores challenged the constitutionality of a municipal licensing ordinance (enacted pursuant to Mass. Gen. L. ch. 140, § 181. A statute referenced in Dedham's amended by-law, on the ground, *inter alia*, that the ordinance treated commercial and noncommercial amusements differently. In response, we rejected

> appellant's argument that the statute and the ordinance are facially under inclusive by reason of their failure to subject non-commercial amusements to the same licensing requirements. We think a legislature could reasonably conclude that non-commercial amusements present sufficiently

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5. We discuss appellant's claim that Dedham's stated interest is illusory and/or pretextual in Part III(C)(1), *infra*.

> less likelihood of the harms sought to be prevented to justify their differential treatment.

Fantasy Book Shop, 652 F.2d at 1121 n.6 (offering examples).

In the case at bar, we think it self-evident that a legislative body might reasonably conclude that the frequency and regularity of activity inherent in an ongoing commercial venture heighten the probability of late-night disruptions and boost the number of likely participants. The profit motive itself, which encourages marketing and promotion aimed at increased consumption, is the surest indicator that, where commercial amusements operate, crowds will probably gather. Hence, the distinction drawn by Dedham between licensed and unlicensed entertainment bears a rational relationship to the specific interests cited by it in enacting Article 4. It follows inexorably that, notwithstanding the differential treatment that the by-law gives to unlicensed as opposed to licensed entertainment, it cannot successfully be condemned as content-based.

2. Targeting. Warbling from a different perch appellant asservates that Article 4 should be strictly scrutinized because it singles out, and in that sense targets, Showcase's midnight movies. This asseveration rests on the notion that strict scrutiny is *always* justified when a municipality enacts an ordinance that, in practical effect, regulates the First Amendment rights of a select group. We consider the notion misguided.

In mounting its "targeting" offensive, appellant relies primarily on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). In *Minneapolis Star*, the Court struck down a state use tax on newsprint and ink, ruling

that the tax violated the First Amendment both because it "singled out the press for special treatment" by taxing newspapers in a manner "without parallel in the State's tax scheme," *id.* at 582, and because it impermissibly "target[ed] a small group of newspapers" within the press as a whole, *id.* at 591.[6] In reaching this result, the Court consigned the Minnesota statute to strict scrutiny, reasoning:

> When the State singles out the press, . . . the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press. . . .

Id. at 585. The Court added that "differential treatment, unless justified by some special characteristic of the press suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.*

Before attempting to transplant the teachings of *Minneapolis Star*, it is important to recall that, in a later case, the Court revisited the matter of differential taxation. *See Leathers v. Medlock*, 499 U.S. 439 (1991). There, the Court ruled that Arkansas could extend its generally applicable sales tax to cable television and satellite services, while exempting print media, without offending the First Amendment. The Court refined the

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6. Because the Minnesota tax exempted the first $100,000 worth of newsprint and ink used annually by each publisher, its burden fell almost exclusively on large newspapers.

analysis it had crafted in *Minneapolis Star*, explaining that targeting engenders strict scrutiny only when regulations (1) single out the press, (2) take aim at a small group of speakers, or (3) discriminate on the basis of the content of protected speech. *Id.* at 447. Because the Arkansas tax measure avoided these pitfalls — for example, there was "no indication" that Arkansas "targeted cable television in a purposeful attempt to interfere with . . . First Amendment activities," *id.* at 448 — the Court concluded that the statute did not warrant strict scrutiny.

It is incumbent upon us to inspect this case through the precedential prism of *Minneapolis Star* and *Leathers*. Reduced to bare essence, appellant's argument for strict scrutiny based on targeting necessarily rises or falls on the second of the three criteria identified by the *Leathers* Court. We believe it falls, for Article 4 does not target Showcase either as a speaker or as a business.

By its terms, Article 4's proscription on activity between 1:00 a.m. and 6:00 a.m. applies to a myriad of other First Amendment speakers, such as persons who from time to time may hold licenses for concerts, dances, or plays. And, moreover, First Amendment speakers are not the only businesses prohibited from late-night operation in Dedham; there is substantial evidence in the record to support the town's contention that the disputed by-law is simply the latest in a progression of by-laws designed to ensure that commercial activities do not impinge unduly on private, residential life.[7] In this respect, Article 4 is

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7. For example, Section 42 of the town's revised by-laws, as amended in 1976, prohibits individuals from selling food at retail between 12:00 midnight and 6:00 a.m. Section 42A, added to the by-laws in 1976 and thereafter revised slightly in 1979, proscribes the sale of virtually all retail commodities except fuel products

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more akin to the tax in *Leathers* — an impost that the Court upheld because it was an extension of a generally applicable tax, 499 U.S. at 447 — than to the tax in *Minneapolis Star* — an impost that the Court struck down because it was "without parallel in the State's tax scheme," 460 U.S. at 582.

To cinch matters, appellant's targeting argument also flies in the teeth of the secondary effects doctrine. Under appellant's formulation, any regulation that has an effect on fewer than all First Amendment speakers or messages could be deemed to be a form of targeting and thus subjected to strict scrutiny. Yet the Supreme Court has recognized that a municipality lawfully may enact a regulation that "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Even appellant's most vaunted precedent does not support its targeting argument. In *Minneapolis Star*, the Court did not condemn all regulations that single out First Amendment speakers for differential treatment; rather, the Court acknowledged that certain forms of differential treatment may be "justified by some special characteristic" of the regulated speaker. 460 U.S. at 585. Secondary effects can comprise a special characteristic of a particular speaker or group of speakers. Accordingly, the language we have quoted from *Minneapolis Star* comfortably accommodates an exception to the prohibition on differential treatment for regulations aimed at secondary

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between 12:00 midnight and 6:00 a.m. Dedham also has adopted a by-law forbidding the illumination of signs for retail establishments during the same six-hour interval.

effects, so long as the disparity is reasonably related to a legitimate governmental interest.[8]

In sum, appellant's targeting argument, like its argument about content quality, fails to furnish a cognizable basis for invoking strict scrutiny. We, therefore, apply an intermediate level of scrutiny in considering the constitutionality of Article 4.

C. Applying Intermediate Scrutiny.

Strict scrutiny aside, restrictions on the time, place, and manner of protected expression — and Article 4 plainly qualifies as such a restriction — should be upheld so long as they are content neutral, closely tailored to serve a significant governmental interest, and allow for reasonable alternative channels of communication. *See Renton*, 475 U.S. at 50; *Clark*, 468 U.S. at 293. Appellant says that Article 4 fails to satisfy any of these three criteria. We do not agree.

1. Governmental Interest. Dedham maintains that the voters enacted Article 4 to "preserve peace and tranquility for Town citizens during the late evening hours." Such an interest, in the abstract, suffices to justify a content-neutral restriction on protected speech (so long as other requirements are met). No less

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8. Appellant's continued insistence that Article 4 unlawfully targets Showcase because it was conceived in response to complaints about disruptions incident to the midnight movies reflects a distorted view both of the secondary effects doctrine and of how a representative democracy functions. An ordinance is not called into constitutional question because its enactment is prompted by non-speech-related concerns (*e.g.*, crime, traffic, noise) stemming from the activity of a specific entity. So here: it works no constitutional insult that the community's concerns about the midnight movies acted as a catalyst that spurred the passage of a generally applicable regulation.

an authority than the Supreme Court has observed that government's "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey*, 447 U.S. at 471.

Appellant concedes that theoretical validity of the town's interest in preserving peace and tranquility, but insists that the record evinces a genuine question as to whether Dedham's articulated concerns, such as noise, crime, and litter, are founded in fact. Going a step further, appellant also contends that Dedham's asserted interest is pretextual and that a race-based animus, instead of a desire to promote serenity, motivated the adoption of the by-law. The record fails to bear out either of these claims.

a.

As an initial matter, appellant asserts that Dedham's professed governmental interest is not substantial because exhibiting midnight movies did not adversely affect the peacefulness of the community, and, therefore, the secondary effects at which Article 4 is aimed are illusory. We agree with appellant's premise: a governmental interest woven exclusively out of the gossamer threads of speculation and surmise cannot be termed substantial. However, we disavow appellant's conclusion: the record before us consists of sturdier stuff and tells a story that strongly supports Dedham's stated purpose. We canvass certain key pieces of evidence.

Before Article 4 was more than a gleam in its sponsors' eyes, numerous citizens had complained about vandalism, trespassing, noise, and late-night traffic through residential neighborhoods (with accompanying disruption from headlight glare). On

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January 19, 1989, Selectman Hoell emphasized at a selectmen's meeting "his concern and the concern of the neighbors in the area of the Cinema regarding incidents at the Cinema during and after the late showings on weekends." At the same meeting, Selectman Kehoe noted that she had "received calls from residents" complaining about "many incidents" at the site, and the police chief Dennis Teehan, reported to the selectmen that "[t]here have been numerous incidents happening in the area . . . after the midnight shows let out." At the February 2 selectmen's meeting, several residents, including John Birda, Bob Zieman, and John Howard, complained that appellant's late-night operations resulted in disruptions, such as noise in the vicinity of a nearby bus stop. Additionally, appellant acknowledged in the district court that, between February 2 and April 6, its representatives "met with . . . Dedham residents on five separate occasions," and that, during these meetings, it "proposed and developed plans to alleviate any articulated concerns pertaining to traffic, noise and security at or around the Showcase Cinemas complex." Appellant's Complaint, ¶ 10. Appellant then put these plans (including, for example, a beefed-up police presence, added patrols, and a litter-removal program) into effect at its expense — thus lending a patina of plausibility to the complaints. Robert Cedrone, chairman of the Poor Farm Committee, a neighborhood alliance, capsulized the situation, describing it in the following terms at the April 24 Town Meeting:

> [There are] more people coming out of the late show cutting through the neighborhood, cutting through back yards. The elderly people still can't get used to that, even with the extra police protection . . . . The people in this neighborhood got to go to sleep . . . . They're sleeping on eggs out there.

Appellant attempts to brush aside these remonstrances. Based on information developed through an in-depth investigation conducted in the course of litigation (and, therefore, well after the fact), it argued that the residents' complaints proved to be phantoms and that therefore Dedham failed to carry its burden of establishing that Article 4 actually serves a substantial governmental interest. In advancing this proposition, appellant in effect argues that a municipality cannot credit complaints and other evidence related to past problems with a particular activity or enterprise unless and until it conducts an independent investigation and corroborates each incident. We do not believe that local legislatures are so constrained.

A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it "reasonably believe[s] to be relevant to the problem" at hand. *Renton*, 475 U.S. 51-52.[9]

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9. Appellant reads *Renton* with an astigmatism bred of self-interest. To be sure, as appellant suggests, the Ninth Circuit initially found the city's stated justifications for the ordinance to be speculative because the city enacted it without the benefit of any studies relating to the city's "particular problems or needs." *Renton*, 475 U.S. at 50 (citation omitted). But the Supreme Court determined that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof," *id.*, reasoning that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *id.* at 51-52. To the extent it is relevant here, *Renton* stands for the proposition that a municipality may rely upon the experience of other communities in assessing, and then addressing, particular problems. It neither holds nor suggests that a city is

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Here, it seems pellucid that, in addressing problems of crime, litter, and noise posed by late-night commercial entertainment activities, Dedham had ample reason to assume that the collocation of factors on display at the Town Meeting — recurrent, wide-ranging complaints lodged by residents, constabulary concern with a pattern of incidents reasonably believed to have occurred in connection with the exhibition of midnight movies, and a common sense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles, who must then depart in the early morning hours — were relevant to, and probative of, its assessment of the problem.[10] Consequently, we reject appellant's contention that Dedham's asserted governmental interest is a phantom.

b.

In addition to attacking the credibility of the town's anecdotal evidence, appellant asserts that Article 4's "ulterior purpose is to keep African Americans out of Dedham. . . ." Appellant's Brief at 39. This is a serious charge — and we treat it as such. Having scoured the record, we agree with the district court that the allegations stands unproven.

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debarred from using *its own experiences* for the same purpose. *See Ward*, 491 U.S. at 800 (holding that a city's substantial interest in limiting sound volume was satisfactorily "evidenced by the complaints about excessive volume generated by respondent's past concerts").

10. In respect to governmental interest, the material fact is whether Dedham had adequate reason to act upon its stated concerns, not, as appellant would have it, whether Dedham's concerns were well-founded. As to the former, the evidence is overwhelming. Hence, the lower court appropriately granted summary judgment on this issue.

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In support of the accusation, appellant relies principally upon a survey purporting to demonstrate that the audience composition for Showcase's midnight movies is approximately 80% African-American as contrasted with an audience composition of approximately 30% African-American for other screenings. Appellant buttressed the survey results with the affidavit of the theater manager, Anthony Pungitore, to the effect that midnight movie audiences have been "predominantly" African-American, at least since 1986. The district court articulated an abiding concern about the relevance and validity of the survey evidence,[11] but eventually accepted it *arguendo* for summary judgment purposes as probative of "the racial mix of Showcase audiences." *National Amusements,* 846 F. Supp. at 1028. Nevertheless, the district court found the record "devoid of evidence that race played a role in the decision to adopt the By-law." *Id.* We reach the same conclusion.

Even accepting appellant's assertion as to the racial composition of the midnight movie audiences, appellant has not linked that fact to the municipal decisionmaking process. That is to say, appellant cites no evidence that any person involved in the passage of Article 4 was aware *at that time* of the racial composition of Showcase's audiences. This omission is fatal to a claim of intentional racial discrimination. *See Washington v. Davis,* 426 U.S. 229, 240 (1976), (elucidating "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"); *Village of Arlington Heights v.*

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11. The survey results were tabulated by a market research firm that appellant engaged for several weeks in the summer of 1993 (three years after the Town Meeting enacted Article 4). The surveyors noted theatergoers' races, and asked a representative sampling of midnight movie patrons, of all races, why each individual chose to attend the late show.

Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) (similar; rejecting claim that municipality's zoning decision was racially discriminatory); *cf. Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that the requirement of discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon on an identifiable group").

Appellant labors valiantly to fill this void, citing statements from various selectmen and town meeting members that are, to appellant's way of thinking, code words demonstrating "institutional racism." Appellant's Brief at 41. Typical of these comments are Selectman Kehoe's reference to "these young kids, who don't even live in Dedham," and Selectman Hoell's references to "nice little out-of-towners" and "the undesirable element that's attracted by [Showcase's] activity." But these statements, if viewed in the most cynical light, are at worst ambiguous. Standing alone, they are insufficient to raise an inference of racial animus. The record chronicles the lengthy series of events incident to the town's consideration of Article 4, and does not contain the slightest indication that the race of theatergoers was an issue. To the contrary, all the evidence supports Dedham's assertion that Article 4 was aimed principally at curbing late-night disruptions. Against this backdrop, the snipets that appellant has extracted from the record with near-surgical precision simply do not support an inference of racism on the part of the legislative body.

While the summary judgment mantra requires us to draw every reasonable inference in favor of the nonmoving party, inferences, to qualify, must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common

sense and human experience indicates is an acceptable level of probability. *Cf. Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989). This means, of course, that a court pondering a Rule 56 motion need not embrace inferences that are wildly improbable or that rely on "tenuous insinuation." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 826 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2965 (1992).

This principle is dispositive of appellant's claim of racial discrimination. While ambiguous remarks may, under some circumstances, help to illuminate the summary judgment record, such remarks rarely will suffice to conceive an issue of material fact when none otherwise exists.[12] As we stated in *Mesnick*, a court is not under an obligation "to draw unreasonably speculative inferences in mulling whether the plaintiff fulfilled his burden of adducing 'specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting *Liberty Lobby*, 477 U.S. at 256). It follows that, "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory

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12. On this point, case law in the age discrimination context is instructive. In that milieu, courts frequently have ruled that ambiguous remarks, without more, are not enough to raise an inference of an employer's discriminatory intent. *See, e.g., Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025 (8th Cir. 1994) (employer's suggestion to employee that he "might want to consider retirement" rather than accept a pay cut found not probative of age discrimination); *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 481 (1st Cir. 1993) (supervisor's statement that company sheltered "no sacred cows" insufficient to raise inference of age discrimination); *Mesnick*, 950 F.2d at 826 (supervisor's comment that he was "sad to lose the youth of the work force" did not, by itself, raise an inference of bias against older employees); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (affirming summary judgment for employer despite supervisor's comment that he chose plaintiff's replacement because the latter was "a bright, intelligent, knowledgeable young man").

allegations, improbable inferences, and unsupported speculation." *Medina-Munoz,* 896 F.2d at 8; *see also Manego v. Cape Cod Five Cents Sav. Bank,* 692 F.2d 174, 177 (1st Cir. 1982) (recognizing that, at the summary judgment stage, "smoke alone is not enough to force the defendants to a trial to prove that their actions were not [racially] discriminatory"; a plaintiff must at least identify "some glowing embers"). So here: asking a court to infer, based on nothing more than the uncommunicated existence of a predominantly African-American theater audience and a handful of arguably ambiguous statements, that a deliberative body of several hundred members acted out of a race-based animus in passing a facially neutral law is simply too much of a stretch.

Because courts occupy a special place in our democracy they must be especially careful not to succumb to the merchants of conjecture. Consequently, they must deal in facts as opposed to suspicions, and in plausible inferences as opposed to speculative suppositions. Fidelity to this ideal constrains us to rebuff appellant's postulatory claim that racial animosity paved the way for Article 4's passage. The record reflects no trialworthy dispute on this issue.

2. ***Narrow Tailoring.*** Appellant complains that Article 4 is not narrowly tailored because it affects *all* licensed entertainment, irrespective of any individualized impact on crime, noise, traffic, or trash. The irony of this position is not lost upon us: appellant seemingly demands in this breath that Article 4 be limited to Showcase Cinemas because the relevant secondary effects have been linked predominantly to that entity, yet in an earlier breath denounced such a focus as impermissible targeting, *see supra* Part III(B)(2). We reject this anfractuous effort to trap Dedham between the Scylla of narrow tailoring and the Charybdis of targeting.

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In *Ward*, the Court explained that the narrow tailoring requirement does not mandate a least restrictive means analysis; "[r]ather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotation omitted). Article 4 meets that test: it promotes the substantial government interest or preserving tranquility — an interest that, as Dedham's past experience demonstrates, would not be achieved as effectively absent the regulation. Nor is the regulation rendered infirm by its general applicability to all licensed entertainment. It is within a legislature's legitimate purview to conclude that such secondary effects as late-night noise and traffic are likely to adhere to *all* commercial entertainment. Indeed, the very existence of a licensing scheme, with its built-in emphasis on commercial amusements, supports Dedham's decision to enact a generally applicable regulation. *See, e.g., Fantasy Book Shop*, 652 F.2d at 1121 n.6 (explaining that a legislature may regulate licensed entertainment based on a reasonable likelihood that patrons would create "excessive noise" or engage in "disruptive or illegal conduct").

3. ***Alternate Avenues of Communication.*** Appellant's contention that Article 4 is invalid because it does not allow for "ample alternative channels for communication of the information," *Clark*, 468 U.S. at 293, need not detain us. The record conclusively demonstrates that adequate alternatives exist allowing appellant to communicate, and audiences to receive, the message contained in the midnight movies. The ban on licensed entertainment affects only five hours out of each 24-hour day, leaving appellant 19 hours (or roughly 80% of each day) in which to communicate its cinematic message. Indeed, the very same films that can no longer be exhibited between 1:00 a.m. and 6:00

a.m. will still be shown an average of six times a day on Fridays and Saturdays, and will be exhibited for roughly 13 hours a day on the other five days of the week.

Appellant readily acknowledges the frequency of its exhibitions, but nonetheless argues that the ban on midnight movies forecloses the opportunity to communicate its message to a distinct segment of the movie-going public. To bolster this argument, it again retreats to its survey. The survey results indicate that, out of a random sampling of midnight moviegoers, 14% said that they attended late shows because they "had to work late, and could only come to a late show," and 11% "felt that the midnight show was the only entertainment option open to him/her." From these somewhat inscrutable results, appellant's market research firm concluded that:

> The late [midnight] show is the only opportunity that the Theater has to exhibit films in order to communicate with a distinct portion of its patrons. Showing films earlier in the day is not a viable means of communication with this segment, because, as indicated by the survey results, these patrons are extremely unlikely and/or unable to attend earlier shows.

There are a slew of problems with the appellant's analysis. First, the survey is not particularly informative because it focuses on the patrons' option *on one particular night.*[13] Thus, patrons

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13. For example, Question No. 2 asked: "Why did you come to the 'Midnight Show' *tonight*?" (emphasis supplied). Similarly, Question No. 3 asked: "If you couldn't get into the movies *tonight*, what other entertainment options would you have?" (emphasis supplied).

who identified the midnight movies as their "only entertainment option" or who said they "could only come to a late show" may well have been confining their answers to one specific evening. Questions of more general applicability were conspicuously lacking. Hence, the wording of the survey defeats appellant's attempted reliance on it.

Second, it is reasonable to assume that midnight movies are commercially successful because some people *prefer* to attend them. Yet, thwarting such an idiosyncratic preference cannot be equated with a denial of adequate avenues of communication. Although Article 4 diminishes the total quantity of appellant's speech in some measure, and simultaneously curtails its opportunity to communicate with some patrons, those are necessary side effects of almost any restriction on speech. As long as restrictions are content-neutral, some diminution in the overall quantity of speech will be tolerated. *See, e.g., City of Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 803, 812 (1984) (finding ample alternative avenues of communication despite assumption that the ordinance "diminishe[d] the total quantity" of appellees' speech).

In short, the lens of inquiry must focus not on whether a degree of curtailment exists, but on whether the remaining communicative avenues are adequate. As the Court phrased it: "That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Ward,* 491 U.S. at 802. Given 19 hours a day within which to exhibit movies, with no special limitations on content, appellant's evidence does not call into legitimate question the adequacy of the alternate routes for communication.

D. *Recapitulation.*

To recapitulate, Dedham has demonstrated, in conformity with the protocol of Rule 56, that Article 4 escapes strict scrutiny. Dedham has also demonstrated that Article 4 survives the lesser degree of scrutiny that obtains here. The municipal by-law is designed to serve a substantial governmental interest, it is narrowly tailored in the service of that interest, and it leaves open ample avenues of communication. Therefore, the district court did not err in granting *brevis* disposition on appellant's ingenious collection of First Amendment initiatives.

IV. MISCELLANEOUS CLAIMS

Appellant makes several additional claims, one under the Due Process Clause of the United States Constitution, one intimating, albeit somewhat obliquely, that Article 4 places an unconstitutional condition on appellant's entertainment license, one involving overbreadth, and the last under Article 16 of the Declaration of Rights contained in the Massachusetts Constitution. These claims lack force.[14]

A. *The Due Process Claim*

Appellant maintains that Dedham did not afford it

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14. Appellant also hints at a claim under the Takings Clause, presumably on the theory that Dedham took its "valuable interests in exhibiting midnight movies" without just compensation. Appellant's Brief at 45. We do not probe the point for appellant, by devoting a mere two sentences to the possibility in its briefs, waived any such claim. *See, e.g., Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.").

procedural due process in adopting Article 4. Its rhetoric rings hollow.

As an initial matter, we doubt that the concept of procedural due process is applicable in respect to the legislative enactment of a generally applicable statute or ordinance. After all, procedural due process is a doctrine most closely associated with assuring fairness in regard to the enforcement of laws or the administration of programs. In general, then, the doctrine bears no relation to the initial enactment of a law. *See* Laurence H. Tribe, *American Constitutional Law* 664 (2d ed. 1988). Indeed, the prospect of a legislative body being required to afford a panoply of protections for all persons who might arguably be affected by a forthcoming statute or ordinance would seem to be a prescription for parliamentary paralysis.

In reaching this conclusion, we follow guideposts erected by the Supreme Court. We find particularly instructive the Court's opinion in *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), a case that arose after the Colorado Board of Equalization promulgated a county-wide increase in property valuations for tax purposes. The petitioner there adopted much the same position that appellant advocates here. Thus, the Court had to decide "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned." *Id.* at 445. Justice Holmes, writing for a unanimous Court, after noting that it was "hard to believe that the proposition was seriously made," *id.*, rejected the due process requirement hawked by the petitioner:

> Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . .

> General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. In language that we find appropriate to our case, Justice Holmes concluded: "There must be a limit to individual argument in such matters if government is to go on." *Id.*

Appellant simply ignores this line of authority. It concentrates instead on the fact that the by-law curtailed its licensed exhibition of films, and tries to argue that the curtailment entitled it to the same due process guarantees as would have obtained had Dedham revoked its entertainment license altogether. This is an exercise in sophism that fails for at least two reasons. In the first place, the by-law did not constitute a revocation of the license. In the second place, the record makes manifest that the town afforded appellant both notice and an opportunity to be heard.

Appellant cites *Derby Refining Co. v. Board of Aldermen*, 555 N.E.2d 584 (Mass. 1990), for the proposition that Dedham could not lawfully enact Article 4 without first according it a full-scale adjudicatory hearing. Appellant misreads the opinion. In *Derby Refining*, the state court held that certain types of licenses, once issued, "become[] a vested property right of the licensee, and may be revoked only when due process protections are complied with." *Id.* at 722. Assuming for the sake of argument that appellant has a cognizable property interest in its license to

exhibit motion pictures, *but cf. Roslindale Motor Sales, Inc. v. Police Comm'r,* 538 N.E.2d 312, 314-15 (Mass. 1989) (holding that motor vehicle dealer did not have a property interest in license to deal in used cars), *Derby Refining* is nonetheless inapposite because the enactment of Article 4 cannot be considered a *revocation* of that license. Unlike the revocation of a license — which results in the total cessation of previously authorized activities — Article 4 does not snatch away appellant's right to conduct the authorized activities, but merely cuts back the hours during which those activities may be undertaken. The entertainment license remains intact.

Appellant's argument also founders because, in this instance, the town afforded process equivalent to that which would have been due at a revocation hearing. The Town Meeting originally passed Article 40, Article 4's progenitor, in the spring of 1989. Before putting Article 40 to a vote, town officials contacted appellant to discuss the residents' concerns. Various meetings were held. On April 10, Pungitore, the theater manager, attended the Town Meeting and was given an opportunity to speak. The desirability of the ban was reconsidered by the Town Meeting on April 24 for the express purpose of "hear[ing] the proponents and opponents of [the by-law]," and to "give a fair chance to the businessmen of the community to put their side of the story forward." During the ensuing debate, Towey, a senior officer of National Amusements, spoke at considerable length against the proposal. Later after the Attorney General sidetracked Article 40, appellant received much the same sort of process in respect to Article 4. For example, Towey attended the November 6, 1989 Town Meeting at which Article 4 was put to a vote, participated fully in the discourse, and delivered a lengthy speech urging rejection of Article 4. No more is exigible.[15]

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15. Appellant bemoans the lack of particular forensic devices, such as cross-

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B. *The "Unconstitutional Condition" Claim.*

To the extent appellant suggests that Article 4 places an unconstitutional condition on its entertainment license, the suggestion is without merit. The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government appropriately might have refused to grant the benefit at all. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions,* 103 Harv. L. Rev. 1413, 1415 (1989).

Not all conditions are prohibited, however; if a condition is germane — that is, if the condition is sufficiently related to the benefit — then it may validly be imposed. In the final analysis, "the legitimacy of a government proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether." *Id.* at 1457 (footnote omitted); *see also Posadas de P.R. Assoc. v. Tourism Co.,* 478 U.S. 328, 345-46 (1986) (upholding Puerto Rico's ban on advertising casino gambling to Puerto Rico residents because "the greater power to completely ban casino gambling necessarily includes the lesser power" to discourage gambling through the prohibition on advertising). "The more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast, are suspect." Sullivan, *supra,* at 1457.

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examination. But even in license revocation proceedings proper, such accouterments are not constitutionally required. *See, e.g., Chongris v. Board of Appeals,* 811 F.2d 36, 41-42 (1st Cir.) (holding that revocation of building permit without affording applicants an opportunity to cross-question witnesses is not a denial of procedural due process), *cert. denied,* 483 U.S. 1021 (1987).

In this instance, Article 4 easily satisfies the requirement of germaneness. Dedham's power to license entertainment as a means of protecting public health and welfare is closely related to the core purpose of Article 4, which, as we have said, is to preserve the nighttime tranquility of the community. Thus, while the ban on licensed entertainment between 1:00 a.m. and 6:00 a.m. may constitute a condition on appellant's license, it is germane and, therefore, not an unconstitutional condition.

C. ***The Overbreadth Claim.***

Appellant attempts to recast its "narrow tailoring" argument, *see supra* Part III(C)(2), as an overbreadth attack. It charges that Article 4 is overbroad because it curtails *all* licensed entertainment, including entertainment that does not produce unwelcome secondary effects. The challenge is baseless.

To be sure, appellant attempts to assert the rights of others but neither standing nor principles of *jus tertii* pose an insuperable obstacle. First Amendment overbreadth doctrine permits "an individual whose own speech or conduct may be prohibited . . . to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (internal quotation omitted). The Supreme Court has limited the sweep of the overbreadth doctrine by imposing "[t]he requirement that the overbreadth be substantial." *Id.; see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Consequently, a "facial" overbreadth challenge will not succeed unless "there [is] a realistic danger that the statute itself will significantly compromise recognized

First Amendment protections of parties not before the Court. . . ." *Taxpayers for Vincent*, 466 U.S. at 801.

Here, appellant has failed to demonstrate that Article 4 is overbroad, let alone substantially so. Dedham's preoccupation with licensed entertainment bears a rational relationship to its stated interests, *see supra* Part III(B)(1), and appellant has cited no examples of other licensees who have been harmed by the by-law despite the absence of secondary effects. That ends the matter. Although Dedham likely would have created overbreadth concerns had it attempted to ban *all* First Amendment activity between 1:00 a.m. and 6:00 a.m., *cf. Jews For Jesus*, 482 U.S. at 570-71, it did not take so bold a step. Rather, Dedham chose a safer path by focusing on those activities — commercial entertainment — most likely to result in late-night disruptions. The claim of invalidity must, therefore, perish.

D. *The State Constitutional Claim.*

Appellant's complaint contained a claim that Dedham's by-law violated the Massachusetts Constitution. In granting summary judgment, the district court finessed the merits of the state constitutional claim. The court noted that, in presenting its arguments, appellant had not drawn any distinction between the federal and state constitutional claims,[16] and ruled, therefore, that appellant had forfeited any chance to argue that the Massachusetts Declaration of Rights offers broader freedom-of-speech protection than the cognate provisions of the First

16. Despite the fact that Dedham moved for summary judgment on all claims, appellant relied almost entirely on federal precedents in opposing the motion. Indeed, appellant only mentioned Article 16 once in its memorandum in opposition to summary judgment, citing it for the uncontroversial point that movies are a form of protected expression.

Amendment. *See National Amusements,* 846 F. Supp. at 1032 n.12.

On appeal, appellant concedes that it treated the two constitutional provisions identically in the court below, and tells us that it did so in the belief that the federal and state constitutional protections for freedom of speech were coextensive as applied to the exhibition of motion pictures. Having had second thoughts in light of the district court's holding that the by-law does not offend the First Amendment, appellant invites us to consider the omitted argument. We decline the invitation.

The short of it is that appellant's change of heart comes too late. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Massachusetts Inst. of Technology,* 950 F.2d 13, 22 (1st Cir. 1991) (collecting cases), *cert. denied,* 112 S. Ct. 1939 (1992). We see no reason to depart from this prudential rule in the circumstances at bar. Given the way in which appellant elected to present its case below, Judge Young acted appropriately in assuming, for purposes of his decision, that the freedom-of-speech protections found in the two constitutions were coterminous. Hence, the disputed ruling must be upheld. *See Mesnick,* 950 F.2d at 829 n.11 (holding that a plaintiff whose complaint contained parallel claims under federal and state antidiscrimination statutes, but who relied exclusively on federal precedent in unsuccessfully opposing summary judgment, could not argue on appeal that state law was more favorably disposed to his claims).

V. CONCLUSION

We need go no further.[17] For the reasons discussed above, we hold that Dedham's by-law, prohibiting the exhibition of motion pictures at the town's only theater between the hours of 1:00 a.m. and 6:00 a.m., passes First Amendment muster. In the bargain, it also survives appellant's other challenges. Accordingly, the order of the district court granting summary judgment in the town's favor must be

Affirmed.

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17. To the extent appellant has raised or alluded to other grounds for appeal, we reject them by this reference. None requires comment.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED FEBRUARY 6, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 90-10472-Y

NATIONAL AMUSEMENTS, INC.,

Plaintiff,

v.

TOWN OF DEDHAM,

Defendant.

MEMORANDUM AND ORDER

YOUNG, D.J. February 6, 1994

As the eye is the window of the soul, so too are American movies the expression of our collective psyche. Movies inform us about our lives, our history, our cultures, and those of others — and distort all four. *See* George MacDonald Fraser, *The Hollywood History of the World — From One Million Years B.C. to Apocalypse Now* (1988). They make us laugh and cry even as they exalt and cheapen our daily lives. They raise the most profound questions of our existence yet are but an ephemeral parody of reality. Above all, since the American movie industry is a business — big business — movies must entertain, and "[t]here is no doubt that entertainment . . . enjoys First Amendment

protection." *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 578 (1976). Guarding the frontier of that protection is a perennial task of America's courts. No function could be more vital.

This particular dispute pits a huge cinema complex against a Massachusetts town and requires analysis of some serious constitutional questions. The matter comes before the Court upon the motion of the Town for summary judgment and the essential facts are undisputed.

UNDISPUTED FACTS

The Plaintiff National Amusements, Inc. ("National") is a corporation organized under the laws of Maryland with its principal place of business located at 200 Elm Street in the Town of Dedham ("The Town"). National owns and operates Showcase Cinemas ("Showcase"), a theater complex consisting of twelve theaters, all of which exhibit first run movies. The Showcase is located on Route 1 in Dedham. In 1978, Showcase commenced the regular exhibition of late evening movies ("late shows") on Friday and Saturday nights. These late shows usually start between 11:30 p.m. and 12:30 a.m. and end between 1:00 a.m. and 2:30 a.m.

At a meeting of the Board of Selectmen (the "Board") for the Town of Dedham on January 12, 1989, a selectwoman voiced her concern about traffic and security problems at the Showcase parking lot and asked for a report from the police department of all incidents at that location for the past three months. A fellow selectman expressed similar concerns at the January 19, 1989 meeting of the Board. Consequently, the Board requested that the management of Showcase come before the Board to discuss the

situation. The Board also placed Article Forty on the Warrant for the annual Town Meeting. As proposed, Article Forty stated:

> ARTICLE FORTY: By the Board of Selectmen: To see if the Town will vote to amend Chapter XIII of the Town By-laws by adding the following new section:
>
> Section 42B — No holder of an entertainment license for theatrical exhibition, public show, public amusement, concert, dance or exhibition, pursuant to General Laws Chapter 140, sections 181 and 183A shall conduct business between the hours of 12 midnight and 6:00 a.m.
>
> This By-law shall not apply to the sale of food or alcoholic beverages to be consumed on the premises at which they are sold when such sale is by a licensed common victualler previously engaged in the sale of food to be consumed on the premises.

(National's Ex. 11.)

On January 23, 1989, the Board sent a letter to the Vice-President of Operations of National conveying the Board's concern over problems stemming from the crowds at the late shows and inviting a representative of National to meet with the Board on February 2, 1989 to discuss the matter. A representative of National did meet with the Board on that day. Approximately thirty residents of the Town, some of whom lived in the general vicinity of the theater, were also present at the meeting.

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National took the Board's concerns seriously. Immediately after the meeting a representative of National met with the Town's Chief of Police to discuss ways to improve security in and around the theater. Virtually immediately, National set up a plan to increase neighborhood protection on Friday and Saturday nights. In accordance with this plan National privately hired off-duty Dedham Police Officers to patrol the theater and the adjacent community and furnished a vehicle to patrol the Showcase parking lot on Friday and Saturday evenings. Occasionally this vehicle would also patrol the surrounding residential neighborhood as well as the local public transportation stops. This new security plan went into effect on February 10, 1989. In addition to heightened security, National also instituted a program of litter clean-up crews and screen announcements describing alternative auto exits.

Despite National's attempts to address the concerns of the Town, the Town Meeting voted on April 24, 1989, to adopt an amended Article Forty which pushed the closing time back to 12:30 a.m. and expressly exempted late night ballroom dancing from the new By-law. On August 14, 1989, however, the Attorney General of the Commonwealth of Massachusetts declared amended Article Forty unconstitutional on the ground that the proposed By-law, by distinguishing ballroom dancing from other forms of entertainment, and more specifically from other forms of dance, failed the content neutrality test and thus violated the Declaration of Rights of the Constitution of Massachusetts.

Undaunted, the Board proposed a new Article Four on the Town Meeting Warrant for a Special Town Meeting on November 6, 1989. The new Article Four stated:

Article 4: By the Board of Selectmen: To see

if the Town will vote to amend Chapter XIII of the Revised By-laws of the Town of Dedham, entitled "Police Regulations" by adding a new section at the end thereof, as follows: Section *57.*

Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, sections 177A, 181, and 183A,[1] shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m. and 6:00 a.m.

Recommendation: That it be so voted.

(National's Ex. 44.)

The Dedham Town Meeting duly approved this Article. On February 8, 1990, the Attorney General for the Commonwealth approved Article Four albeit noting expressly that he was unable to make a factual determination as to whether the effect of closing certain licensed establishments between 1:00 a.m. and 6:00 a.m. was substantially related to the Town's proper governmental interests or whether the effect was greater than necessary to protect that governmental interest. Upon the approval of the Attorney General, Article Four (hereafter called "the By-law") took effect twenty days later.

National was ready. It filed suit in this court on the same day.

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1. In general, Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A grants cities and towns the authority to grant and revoke licenses for amusement devices, concerts, dances, exhibitions, public shows, and the like.

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In its complaint National alleged that Article Four violates National's free speech rights under both the United States Constitution and the Massachusetts Declaration of Rights, violates the due process clause in being unfairly vague and ambiguous, and violates the equal protection clause in that it unreasonably restricts National's hours of operation while permitting other licensed establishments beyond the reach of Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A — for example, hotel lounges and bars and other forms of licensed entertainment such as cable television — to continue operation after 1:00 a.m. National sought injunctive relief and this Court, as is its wont, consolidated the hearing on National's motion for a preliminary injunction with an immediate trial on the merits. Fed. R. Civ. P. 65(a)(2). Faced by the prospect of a full trial, the Board of Selectmen caved in, stipulating that the By-law would not be enforced with respect to ten of the twelve theaters in the Showcase complex pending the outcome of the instant case.[2] National, for its part, withdrew its motion for preliminary injunctive relief, and both parties successfully sought a continuance on the ground that the case was probably on its way to settlement.

The parties could not, however, reach a settlement. For a time, the Court urged adoption of a statement of agreed facts, *see*

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2. The power of the Board of Selectmen simply to stipulate that they would not enforce a duly-enacted town By-Law is unclear. Apparently the Board feared the cost of a major legal confrontation. Viewed from this perspective the Board action is simply a stark example of the situation that today confronts the executive branch of government at the local, state, and national levels. Perennially strapped for cash, with a legislature — here, the Dedham Town Meeting — unwilling to raise taxes, what may be called 'law enforcement triage' necessarily takes place, with the result that only certain laws are enforced and those only to the level of available resources.

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Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 429 n.7 (1st Cir. 1992) and *Boston Five Cents Savings Bank v. Secretary of Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985), but, despite efforts toward this end, no agreement as to material facts was reached. As the case dragged on, National evidently began to feel that its position needed bolstering in light of the Town's argument that the By-law is a reasonable, content neutral 'time, place, or manner' restriction. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). In late June and early July, 1993, National secretly engaged a marketing research firm to visually survey the patrons of its evening shows, note their race, and inquire of a representative sampling of late show patrons (without regard to race) why they chose to attend the late show. (National's Ex. 110).[3] This survey — marked confidential and privileged (though it is not) —purports to show that the majority of late show movie viewers are black, and that many late night patrons prefer that time slot. (*Id.*) National now contends, without amending its Complaint, that the survey is evidence that racial animus impended the Town to enact the By-law. Faced with an ever expanding stain of allegations, escalating defense costs, and no end in sight, the Town did what it could easily have done three years ago to cap its transaction costs — it moved for summary

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3. This secret and invidious survey raises extremely troubling questions concerning the judgment of National and its counsel. One wonders at the feelings of patrons of the Dedham Showcase Cinema during the summer of 1993 had they known they were secretly being counted and categorized based on their race. Indeed, what National did here appears the functional equivalent of noting the race of a customer on a check — a violation of Mass. Gen. L. ch. 93, § 105(b)(5) which implicates Mass. Gen. L. ch. 93A, § 2. Accordingly, the Clerk of Court is directed to send a certified copy of this opinion to the Attorney General of Massachusetts for such further investigation pursuant to Mass. Gen. L. ch. 93A, § 4 as he may deem appropriate.

judgment upon the undisputed — albeit now voluminous — record.

ANALYSIS

The outcome of this aspect of the case turns on the level of judicial scrutiny applied to the By-law.

> The Supreme Court has evolved two distinct approaches to the resolution of first amendment claims; the two correspond to the two ways in which government may "abridge" speech. If a government regulation is aimed at the communicative impact of an act, analysis should proceed along what we will call *track one*. On that track, a regulation is **unconstitutional** unless government shows that the message being suppressed poses a "clear and present danger," constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny. If a government regulation is aimed at the noncommunicative impact of an act, its analysis proceeds on what we will call *track two*. On that track, a regulation is **constitutional**, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas.

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. . .

> Government may be deemed to have "abridged" speech in the first sense, thus triggering track-one analysis, if *on its face* a governmental action is targeted at ideas or information that government seeks to suppress, or if a governmental action neutral on its face was *motivated* by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty. Of course, the target of government action will be instantly recognizable if the government openly admits that its purpose is limiting information or suppressing an idea, but government will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself — often, by invoking the permissive talisman of "time, place, or manner" regulation.

Laurence H. Tribe, *American Constitutional Law*, 2d ed. (1988) at 791-92, 104 (footnotes omitted, emphasis added).

Regulations focusing on the direct impact of protected speech on its audience are thus **content based.** *Boos v. Barry*, 485 U.S. 312, 321 (1988). Since they target express language and its frank impact on an audience, content based restrictions face a heavy presumption against constitutionality. Consequently, in order for a state to enforce a content based restriction, it must show that the ordinance serves a compelling state interest and that the restriction is narrowly drawn to meet that end. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

Content neutral restrictions, on the other hand, are "those that 'are *justified* without reference to the content of the regulated speech.' " *City of Renton,* 475 U.S. at 48 (citations omitted) (emphasis in original). Unlike content based restrictions, content neutral restrictions are aimed at the secondary effects of the language. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-94 (1984). In other words, the justification undergirding content neutral restrictions "ha[s] nothing to do with . . . speech." *Boos v. Barry,* 485 U.S. at 320. Therefore, in order to sustain a regulation that is content neutral the government need only establish that the restriction is a reasonable restraint on the time, place, and manner of such speech and that the law does not unreasonably limit alternative avenues of communication. *City of Renton,* 475 U.S. at 47, citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

By its terms the By-law in the present case prohibits, between 1:00 a.m. and 6:00 a.m., ***all*** activity licensed under Mass. Gen. L. ch. 140, §§ 177A, 181, and 183A.[4] "Any inference that government's aim is keeping people ignorant of ideas or information that it considers dangerous must normally be made in the first instance from the face of the statute." L. Tribe, *supra* at 794-95. Here, after a close reading of the By-law, this Court draws no inference that on its face the By-law aims at either the content of the movies or their influence on their viewers. Indeed, National concedes as much. National does not attempt to argue that the By-law is content based. To the contrary, at ¶ 26 of Count One of the Complaint alleging violations of the First Amendment and Article Sixteen of the Massachusetts Declaration of Rights, National complains that the By-law represents a "purported effort to solve certain alleged problems where such problems are shown

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4. *See supra* at 5, n. 1.

to be unrelated to the speech activity itself." Thus National concedes that justification of the By-law stems from the Town's desire to curb the secondary effects of late shows. Therefore, it is undisputed, and this Court rules, that as a matter of law the By-law is content neutral.

Analysis does not end at this point. Even though the By-law is content neutral, it does restrict somewhat a vitally important outlet for speech and thus the Court must examine whether the By-law is legitimately aimed at the secondary effects of late night entertainment and, if so, whether those secondary effects are of significant governmental interest and allow reasonable alternatives for the same communication. *Young v. American Mini Theatres,* 427 U.S. 50, 63 n.18 (1975) (a reasonable time, place, and manner restriction must advance a significant governmental interest); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984) (a reasonable time, place, and manner restriction must allow reasonable alternatives for that same communication).

The Minutes of the Board Meetings and the transcripts of Town Meetings during the discussions concerning National reveal that the Town was ostensibly concerned about late night traffic as well as actual and potential security problems at the Showcase and surrounding neighborhood. (*See generally,* Town's Exs. 4-33; National's Ex. 28, 29, 40, 42, 43, 100, 101). According to the deposition testimony of Board members, the By-law was adopted in part to quell traffic problems and in part to ensure that there was a period of time during the late evening hours, when Town citizens were generally sleeping, that was devoid of retail sales and other commercial activity. (Kehoe Dep. at 39-40, 71, 74-79; Taurasi Dep. at 34, 35, 37-39, 42, 52-54; Boylen Dep. at 27; *see also* Greenwood Dep. at 53, 54, 59.)

National does not directly impugn this evidence but it does argue that the proffered "significant government interest" is, in fact, a sham and that the passage of Article Forty and the subsequent Article Four are racially motivated and seek to target blacks and restrict their entertainment options.[5] National suggests that references such as "undesirable element that's attracted by General Cinema activity" (Transcript of April 24, 1989 Town Meeting — National's Ex. 34 at 60-61), "people problems" (Transcript of April 10, 1989 Town Meeting — National's Ex. 33 at 92), and "nice little out-of-towners" (Transcript of April 24, 1989 Town Meeting — National's Ex. 34 at 60) carry racial overtones and are but code words to mask racial animus. It clinches its argument with reference to its secret survey.

While the Court, for purposes of this motion, will accept the arithmatic accuracy of the survey and the conclusory assertions that it conforms to accepted marketing survey practice, it is simply not probative, as a matter of logic, of most of the essential points for which National advances it.

It is undisputed that the survey was conducted only for a few weeks during the summer of 1993. Even so, the Court puts aside the considerations that movies are marketed primarily to the young, that school was out, that homework was over, and that people were moving into a summer jobs and vacation schedule since the affidavit of Anthony D. Pungitore, manager of the Showcase since 1986, avers that late show patrons are, and have been at all material times, "predominantly" black, while moviegoers earlier in the evening are "predominantly" white.

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5. Although National is not a member of a protected class, this Court rules that it has standing to assert the rights of its patrons. *See Secretary of State of Maryland v. Joseph H. Munson Co. Inc.*, 467 U.S. 947, 955-58 (1984).

The Court therefore accepts the racial mix of Showcase audiences as proffered by National.

But what of it? On the present record, there is not the slightest evidence that anyone ever gave this a thought until National began totaling up its customers and separating them by race. The summary judgment record is devoid of evidence that race played a role in the decision to adopt the By-law. Selectman Hoell testified that he has no knowledge of the race or color of patrons of the late shows and that, prior to his deposition, he had never discussed the race or color of theater patrons with neighbors of the Showcase. (Hoell's Dep., Town's Ex. 25 at 81-82.) Selectwoman Kehoe also testified that she had no knowledge, at the time of the enactment of the By-law, as to the race of the patrons of the late shows. (Kehoe Dep., Town's Ex. 15 at 89.) Also according to Kehoe and Selectman Taurasi the Town has never conducted demographic studies relative to the late shows. *(Id.;* Taurasi Dep., Town's Ex. 16 at 57.) While a court must be hesitant to grant summary judgment where matters of mental intent are at issue, *Hahn v. Sargent,* 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976), since *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986), National must come up with **some** evidence that would carry the burden of production on the issue of racial animus. *Villanueva v. Wellesley College,* 930 F.2d 124, 127-28 (1st Cir.) *cert. denied,* 112 S. Ct. 181 (1991). It has had three years to do so. It has failed.

To the contrary, upon the present record "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *City of Renton,* 475 U.S. at 50, quoting *Young v. American Mini Theatres,* 427 U.S. 50, 71. In order for the Town to show that it was attempting to preserve the quality of urban life, it need only establish that evidence relied upon in enacting the By-law was "reasonably believed to be relevant to

the problem that the [Town] address[d]." *City of Renton,* 475 U.S. at 51-52. The evidence in the present case discloses that the Town relied upon the complaints of neighborhood and nighttime disturbances voiced by the residential abutters of the Showcase complex. It is undisputed that the Town's residents expressed general displeasure with the theater complex. National concedes that between February 2, 1989 and April 6, 1989 representatives of National "met with Town of Dedham residents on five separate occasions. During the course of these meetings, National proposed and developed plans to alleviate any articulated concerns pertaining to traffic, noise and security at or around the Showcase Cinemas complex." (Complaint ¶ 10). While the Court recognizes that National undertook to assuage the concerns of the Town residents, the Town's choice of a different method to combat those problems does not call into question either the Town's articulated concerns or relevance of the By-law to those concerns. *City of Renton,* 475 U.S. at 52.

This Court finds, therefore, that the By-law is genuinely aimed at the secondary effects of late night movies[6] and rules that dealing with these articulated secondary effects constitutes a valid governmental interest.

Balked of victory in challenging the 'significant governmental interest' portion of the test, National turns to challenge the assertion that the By-law allows reasonable alternatives for the same communication. National concedes, of course, as it must, that the Showcase runs the same movies at both

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6. This determination is what my friend and colleague Judge Keeton refers to as finding a "premise fact." Robert E. Keeton, Legislative Facts and Similar Things: Deciding Disputed Premise Facts, 73 Minn. L. Rev. 1, 8 (1988). This is to be distinguished from the finding made *infra* under Fed. R. Evid. 104(a). Keeton, *supra* at 8 n. 19, and 68 n. 185.

the early and late night showings, the earlier showings being entirely unaffected by the By-law. To the logical observation that the afternoon and evening showing afford a reasonable venue for the same communication, however, National again has recourse to the secret survey, this time with a bit more success.

Taking the survey and the Pungitore affidavit together, and drawing all inferences in favor of National, it appears that more blacks than whites consistently attend the late shows. It follows, therefore, that prohibiting the late show will affect more blacks than whites.

National then seeks to bootstrap its so-called 'disparate impact' analysis into a requirement that the By-law be subjected to strict scrutiny. The attempt will not wash.

National asserts that the Supreme Court's recent decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 113 S. Ct. 2217 (1993) ("*Babalu*"), requires this Court to go back and examine both direct and circumstantial evidence to determine if the object of the law was to restrict blacks from attending the late night shows. In *Babalu,* the Supreme Court warned that a "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens" on selected groups. *Id.* at 2232. *Babalu,* however, dealt with an ordinance explicitly prohibiting ritualistic animal sacrifices. The Supreme Court ruled that the use of the word "ritual" and "sacrifice" necessarily implicated religious practices and therefore the ordinance targeted the Santeria religion and, in the parlance of the present analysis, was not content neutral. *Id.* at 2228. *See* Stephen L. Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118, 125 (1993). Here, in contrast, this Court has ruled that the By-law is genuinely content neutral and a valid exercise of a Town's police powers. The *Babalu* decision is not controlling.

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The fact that the By-law may incidentally affect one protected class more than the general public does not necessarily subject that ordinance to strict scrutiny. Though otherwise inapposite, *Babalu* does provide some guidance on this point, since the general applicability requirements that undergird the Freedom of Religion Clause parallel First Amendment jurisprudence. *Babulu,* 113 S. Ct. at 2232 (citations omitted). Indeed, freedom of religion cases have often addressed the issue of ordinances that seemingly have a greater adverse affect on particular religions than on the general populace. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Babalu,* 113 S. Ct. at 2226, citing *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). Such is the situation here.

Even so, the serious nature of the allegation of "disparate impact" has caused the Court to scrutinize the record with care in light of the teachings of *Babalu.* Such scrutiny reveals that the entire claim of "disparate impact" rests on a logical fallacy. The question presented in this step of the analysis is whether there are reasonable alternatives for the same communication — here specifically whether the afternoon and evening showings of the same movies in the same theater constitute such a reasonable alternative. The secret survey and the Pungitore affidavit establish that more blacks than whites attend the late shows. The question, then, is this — what happens to the movie communication with these people if the By-law bans the late shows? It is here National claims the disparate impact.

The claim is nonsense. To prove that canceling the late shows would extinguish a significant amount of protected

communication, the survey inquired of every third theater patron — during the short period it was conducted — their reasons for attending. This written survey was conducted regardless of the race of the patron. It is, therefore, simply not possible to infer — the secret survey itself does not even make this claim, it is found in the affidavit of Lara Jordan James — that the effects of closing down the late night shows are any different for blacks as a group than for whites. That is, for all that appears, the effect of closing down the late night shows is identical for each patron and his or her alternative entertainment options are identical regardless of race. There simply is no disparate effect along racial lines and this is the concern where the issue is the adequacy of alternative times for the same communication.[7]

National is thus left with the claim that closing down its late night shows will deprive certain of its patrons of the opportunity to visit the Showcase (and National of the opportunity to screen films for them for a fee). This claim makes some sense. National does not run its late shows as a public service. Its aim is to make money. If everyone who attends the late shows would come to the matinee or evening shows, surely the economies of scale and the resultant personnel savings would themselves force National to

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7. It is important to understand what the Court is doing here. The James' affidavit expressly concludes, "[C]ancelling this show would have a disproportionate impact on [black] members of the theater-going public. . . . [T]he late show is the only opportunity that the Theater has . . . to communicate with a distinct portion of its patrons." (National's Ex. 110.) This is purported expert opinion. The Court, however, rejects these conclusions as logically indefensible in exercise of its duty to make preliminary findings under Fed. R. Evid. 104(a) before receiving so-called expert opinions. *See LeBlanc v. Great American Inc. Co.*, 6 F.3d 836, 848 (1st Cir. 1993) (affirming district court decision upon summary judgment record to exclude statistical opinion due to inadequate sample size).

cease late shows wholly without the By-law.[8] The Court thus credits National's claim that the By-law will operate to deprive it of a portion of its audience.

The question, however, is whether the By-law allows for **reasonable** alternatives for the same communication. National, again pointing to its secret survey, says not. While the Court must give every inference to National in adjudicating this summary judgment motion, it cannot help but approach the survey with some skepticism since no raw data have been provided and the individual responses are aggregated and appear to be summarized in a fashion slanted to favor National's contentions. Still, to give the survey its due, it appears that during the short time it was conducted that 14% of the late night patrons reported they had to work late and could only come to "a late show" while an additional 11% may[9] have considered this their only entertainment option. Thus, giving National every reasonable inference, a full quarter of its late show patrons (or roughly 75-125 people each evening, given the survey ticket tallies) will miss the movies they otherwise would have seen at the Showcase if the By-law is enforced. The Court rules, nevertheless, that given the content neutral nature of the By-law and the legitimate governmental interests that support it, the By-law does afford reasonable alternative means of expressing the same communication.

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8. This conclusion assumes no competitor in the relevant market is exhibiting movies during the late night time slot. The summary judgment record here makes no mention of any such competition.

9. The word "may" is appropriate here since the survey is internally inconsistent on the point, reporting elsewhere that but 5% of late show patrons had no other entertainment option. The latter figure is the more persuasive. It corresponds generally with those who say they would spend time with friends (5%), play board or video games at home (4%), or make love (3%) were there no late show to attend.

National argues, even so, that less restrictive, narrowly tailored means could remedy the same problems as sought to be curbed by the By-law. "The term 'narrowly tailored' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986). A content neutral analysis, however, does not require the Court to find that the restriction is a narrowly tailored means to an end. The Supreme Court has held the "[l]ess-restrictive-alternative analysis . . . has never been part of the inquiry into the validity of a [content-neutral] time, place, and manner regulation. It is enough that the . . . restriction substantially serves the Government's legitimate ends." *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (footnote omitted). Consequently this Court need not and will not engage in a less restrictive alternative analysis. The holding that the By-law affords reasonable alternative means for the same communication will stand.

As its last ditch stand, National argues that the By-law is violative of due process in that it is unconstitutionally vague and targets the Showcase, thus demanding a higher level of scrutiny.

In the First Amendment area especially, the Supreme Court requires "precision of drafting and clarity of purpose." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975). An ordinance which is imprecise and ambiguous as to substantial provisions is void for vagueness. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). National pins its vagueness claim on the fact that the By-law fails to define precisely what constitutes licensed activity. Here, the By-law prohibits the conduct of any

activity licensed under Mass. Gen. L. ch. 140, §§ 177, 181, and 183A between the hours of 1:00 a.m. and 6:00 a.m. Activities licensed under Mass. Gen. L. ch. 140, § 181 include "theatrical exhibitions, public shows, public amusements and exhibitions of every description." The By-law provides sufficient guidance as to what activities are specifically proscribed. This includes public movie showings. *See City of Fitchburg v. 707 Main Corp.*, 369 Mass. 748, 751 (1976).

Last, National asserts that since the Showcase is the only licensed entertainment complex conducting its license after 1:00 a.m. and since it is named on the petition which ultimately led to the proposed Article Forty, Showcase is the victim of targeting. In support of this contention, National cites *Leathers v. Meadlock*, 499 U.S. 439, 447 (1991) (a state sales tax on cable services, which exempted print media, did not violate the First Amendment) which held that an ordinance "will trigger heightened scrutiny if it discriminates on the basis of the content of . . . speech." This case is wholly inapplicable to the present situation since the By-law is not content based.[10] In fact, National is not the only commercial business whose profits are curtailed by Town By-laws which prohibit late night business activity.[11]

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10. National also looks to *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1982). *Minneapolis Star*, however, also involved an ordinance that was not content neutral.

11. The town has a progression of ordinances designed to insure that commercial activities do not impinge on private, residential life. Section 42 of the Town's Revised By-law, as amended in 1976, prohibits individuals from the retail sale of food between the hours of 12:00 midnight and 6:00 a.m. In 1978, the Town rolled back the closing time for licensed establishments which sell alcoholic beverages from 2:00 a.m. to 1:00 a.m. Section 42A, added to the By-laws in 1976

(Cont'd)

Appendix B

CONCLUSION

The Court declares that the By-law at issue here is content neutral, serves a legitimate governmental interest, and offers reasonable alternative avenues for the same communication. It is, therefore, a reasonable time, place, and manner restriction on First Amendment rights which does not violate the Equal Protection clause, as its incidental effect upon a protected class is no different than on society generally. Moreover, the Court rules that National has received such process as is its due from the Town and from this Court.[12]

For these reasons, the Town's motion for summary judgment is GRANTED.

s/ William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

(Cont'd)
and amended in 1979, prohibits retail establishments from the sale of any retail commodity (except fuel products) between 12:00 midnight and 6:00 a.m. Finally, in 1980 the Town voted to prohibit the illumination of signs for retail establishments which were proscribed from operation under section 42A.

12. While the Court recognizes that in some respects the protections of the Declaration of Rights of the Constitution of Massachusetts sweep more broadly than the cognate provisions of the Bill of Rights, *see e.g., Commonwealth v. Sees*, 374 Mass. 532, 536-38 (1978) (nude dancing protected as expressive); *see generally* Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U. L. Rev. 887 (1980), no broader protection for the late shows is here claimed to arise out of the Constitution of Massachusetts. The point being waived, the Court assumes, without deciding, that the freedom of speech protections found in the two constitutions are coextensive.

APPENDIX C — TOWN OF DEDHAM AMENDED BY-LAW

MARGARET M. McGOWAN
TOWN CLERK

TOWN OF DEDHAM
COMMONWEALTH OF MASSACHUSETTS

TEL 326-1638

SPECIAL TOWN MEETING, NOVEMBER 6, 1989

ARTICLE 4: By the Board of Selectmen:

To see if the Town will vote to amend Chapter XIII of the Revised By-Laws of the Town of Dedham, entitled, "Police Regulations" by adding a new section at the end thereof, as follows:

> Section 57.
>
> Unless otherwise restricted, no holder of a license issued by the Town of Dedham, pursuant to Massachusetts General Laws, Chapter 140, Sections 177A, 181 and 183A, shall permit any activity licensed thereunder to be conducted between the hours of 1:00 A.M. and 6:00 A.M.

It was so VOTED. UNANIMOUS VOTE

A true copy attest:

s/ Margaret M. McGowan
Margaret M. McGowan
Town Clerk

APPENDIX D —RELEVANT STATUTES

Mass. Gen. L. ch. 140, § 177A:

AUTOMATIC AMUSEMENT DEVICES

Caption added by St.1949, c. 361

§ 177A. Amusement devices; license; definition; fee; view and inspection; gambling; nonapplicabilty of lottery statute

(1) The licensing authorities of any city or town may grant, and after written notice to the licensee, suspend or revoke a license to keep and operate an automatic amusement device for hire, gain or reward, approved by the director of standards and necessaries of life under section two hundred and eighty-three of chapter ninety-four.

(2) The term "automatic amusement device" as used in this section shall be construed as meaning any mechanism whereby, upon the deposit therein of a coin or token, any apparatus is released or set in motion or put in a position where it may be set in motion for the purpose of playing any game involving, in whole or in part, the skill of the player, including, but not exclusively, such devices as are commonly known as pinball machines including free play pinball machines.

(3) Licenses granted under this section, unless sooner revoked, shall expire on December thirty-first of each year. Every such license shall specify the street and number of the premises where the automatic amusement device is to be kept or offered for operation or give some particular description of such premises, shall state the type of the automatic amusement device to which it relates, and shall cover any automatic amusement device of the same type which as a substitute or replacement for the automatic

amusement device licensed, may, during the term of the license, be kept or offered for operation on the premises specified; but such license shall under no circumstances cover an automatic amusement device of a type other than the type stated in such license; and such license shall not cover the automatic amusement device if in any place other than the premises from time to time specified in such license. No such license shall specify more than one premises at one time. Upon written application, the licensing authority may from time to time amend any license granted under this section by changing the premises specified.

(4) The annual fee for a license under this section for any automatic amusement device licensed hereunder, or any renewal thereof, shall be twenty dollars, unless otherwise established in a town by town meeting action and in a city by city council action, and in a town with no town meeting by town council action, by adoption of appropriate by-laws and ordinances to set such fees, but in no event shall any such fee be greater than one hundred dollars. The fee for every change of premises shall be two dollars.

(5) Automatic amusement devices licensed under this section shall be so installed on the premises described in the license as to be in open view at all times while in operation, and shall at all times be available for inspection.

(6) No person keeping or offering for operation or allowing to be kept or offered for operation any automatic amusement device licensed under this section shall permit the same to be used for the purpose of gambling.

(7) The provisions of section seven of chapter two hundred and seventy-one of the General Laws shall not apply to machines licensed under the provisions of this section.

(8) Any violation of any provision of this section or of chapter one hundred and thirty-six of the General Laws by any person managing or controlling any premises where an automatic amusement device licensed under this section is kept or offered for operation shall be cause for the revocation of all licenses for automatic amusement devices kept or offered for operation on such premises.

Added by St.1949, c. 361. Amended by St.1981, c. 351, § 83; St.1981, c. 520

Mass. Gen. L. ch. 140, § 181:

THEATRICAL EXHIBITIONS, PUBLIC AMUSEMENT, ETC.

§ 181 Licenses; fees; application; suspension or revocation; workmen's compensation coverage

The mayor or selectmen may, except as provided in section one hundred and five of chapter one hundred and forty-nine, grant and set the fee for, upon such terms and conditions as are described hereinafter, a license for theatrical exhibitions, public shows, public amusements and exhibitions of every description, to be held upon weekdays only, to which admission is obtained upon payment of money or upon the delivery of any valuable thing, or in which, after free admission, amusement is furnished upon a deposit of; money in a coin controlled apparatus, but in no event shall any such fee be greater than one hundred dollars.

The application for such a license shall be in writing and shall fully and specifically describe the conditions of the proposed exhibition, show, or amusement and the premises upon which the proposed exhibition, show, or amusement is to take

place, to the extent that such conditions or premises would affect the public safety, health or order. Upon written request of the mayor or selectmen, the applicant shall in addition furnish reasonable information concerning the conditions of the premises and actions to be taken in order to prevent danger to the public safety, health, or order. Within thirty days following receipt of such application, the mayor or selectmen shall grant a license or shall order a hearing preceded by at least ten days written notice to the applicant. Within forty-five days next following the close of such hearing, the mayor or selectmen shall grant such license or shall deny such license upon a finding that issuance of such a license would lead to the creation of a nuisance or would endanger the public health, safety or order by:

(a) unreasonably increasing pedestrian traffic in the area in which the premises are located or

(b) increasing the incidence of disruptive conduct in the area in which the premises are located or

(c) unreasonably increasing the level of noise in the area in which the premises are located.

Notice of such a denial shall be delivered to the applicant in writing and shall be accompanied by a statement of the reasons therefor. No application shall be denied if the anticipated harm is not significant or if the likelihood of its occurrence is remote. The mayor or selectmen may impose conditions upon a license but said conditions may only relate to compliance with applicable laws or ordinances, or to public safety, health or order, or to steps required to be taken to guard against creation of a nuisance or to insure adequate safety and security for patrons or the affected public.

Appendix D

No applicant having been denied a license as aforesaid shall submit the same or a similar application within one year of said denial without including in said new application facts showing that the circumstances upon which the original denial was based have substantially changed.

The mayor or selectman may revoke or suspend a license granted pursuant to the provisions of this section upon finding, after a hearing preceded by ten days written notice to the licensee, that conditions exist which would have justified denial of the original application for such license provided, that the mayor or selectmen may petition the superior court department of the trial court to enjoin any violation of this section.

No license shall issue, however, for a traveling carnival, circus or other such traveling amusement which does not have its principal place of business within the commonwealth unless the licensee certifies that he has provided by insurance for the payment of compensation and the furnishing of other benefits under chapter one hundred and fifty-two to all persons to be employed by said licensee and that such insurance shall continue in full force and effect during the term of the license; and the licensee further certifies that he has obtained a policy of public liability insurance in the amount of at least twenty-five thousand dollars to pay any claims or judgments rendered against the licensee in favor of patrons or others to recover damages resulting from the negligence of the licensee. The amount of insurance of the policy hereinbefore required or in effect shall not limit or impair any right of recovery to which any plaintiff may be entitled in excess of such amount.

Amended by St. 1971, c. 996; St.1979, c. 358, § 3; St.1981, c. 351, § 84.

Appendix D

Mass. Gen. L. ch. 140, § 183A:

§ 183A. Concerts, dances, exhibitions, public shows, etc.; license; application; suspension or revocation; rules and regulations

No innholder, common victualler, keeper of a tavern, or person owning, managing, or controlling any club, restaurant or other establishment required to be licensed under section twelve of chapter one hundred and thirty-eight or under section two, twenty-one A or twenty-one E of chapter one hundred and forty, and no person owning, managing, or controlling any concert, dance, exhibition, cabaret or public show of any description to be conducted on any premises required to be licensed under the sections described above, shall, as a part of its usual business, offer to view, set up, set on foot, maintain or carry on a concert, dance exhibition, cabaret or public show of any description, unless and until a license therefor has been issued by the licensing authorities.

The application for such license shall be in writing and shall state the type of concert, dance, exhibition, cabaret or public show sought to be licensed and shall state whether such public show will include: (a) dancing by patrons, (b) dancing by entertainers or performers, (c) recorded or live music, (d) the use of an amplification system, (e) a theatrical exhibition, play, or moving picture show, (f) a floor show of any description, (g) a light show of any description, or (h) any other dynamic audio or visual show, whether live or recorded.

The application shall also state whether as part of the concert, dance exhibition, cabaret or public show any person will be permitted to appear on the premises in any manner or attire as to expose to public view any portion of the pubic area, anus, or

genitals, or any simulation thereof, or whether any female person will be permitted to appear on the premises in any manner or attire as to expose to public view any portion of the breast below the top of the areola, or any simulation thereof.

Upon request of the licensing authorities, the applicant shall furnish further additional information concerning the type of concert, dance exhibition, cabaret, or public show sought to be licensed, the conditions of the premises, and the actions to be taken in order to prevent danger to the public safety, health or order. Once a license has been granted to an applicant, the licensee shall continue to provide such information to the licensing authorities upon their request with regard to any particular concert, dance, exhibition, cabaret, or public show or with regard to the conduct of the premises in general.

Within forty-five days following receipt of an application for a license under this section, the licensing authorities may (a) grant a license or, (b) shall provide the opportunity for a hearing on the application by written notice to the applicant given seven days prior to the hearing date.

Within thirty days next following the final date of such opportunity for a hearing the licensing authorities shall, (a) grant the license or, (b) deliver to the applicant a written notice denying the license and stating in writing the reasons for such denial. No application having been denied as aforesaid and no similar application thereto may be filed within one year of said denial except in the discretion of the licensing authorities.

The licensing authorities shall grant a license under this section unless they find that the license, taken alone or in combination with other licensed activities on the premises, would adversely affect the public health, safety or order, in that the

concert, dance, exhibition, cabaret, or public show cannot be conducted in a manner so as to: (a) protect employees, patrons, and members of the public inside or outside the premises from disruptive conduct, from criminal activity, or from health, safety or fire hazards; (b) prevent an unreasonable increase in the level of noise in the area caused by the licensed activity or caused by patrons entering or leaving the premises; or (c) prevent an unreasonable increase in the level of pedestrian or vehicular traffic in the area of the premises or an unreasonable increase in the number of vehicles to be parked in the area of the premises.

The licensing authorities may modify, suspend or revoke a license granted pursuant to the provisions of this section after providing an opportunity for a hearing preceded by a written notice to the licensee ten days prior to the hearing date. The licensing authorities may not motify, suspend or revoke such license unless they find that the license, taken alone or in combination with other licensed activities on the premises, has adversely affected the public health, safety or order as stated in the preceding paragraph. In any case in which the licensing authorities modify, suspend or revoke a license, they shall notify the licensee in writing of such action and said written notice shall be accompanied by a statement of reasons.

In order to preserve and protect the public health, safety, and order as aforesaid, the licensing authorities may place conditions upon the license and promulgate rules and regulations for such licenses. The licensing authorities may modify, suspend or revoke a license pursuant to this section for any violation of their rules and regulations or for any violation of law and may petition the superior court department of the trial court to enjoin any violation of this section.

Appendix D

The licensing authorities of any city or town may adopt a rule requiring licensees under this section to prohibit minors from attending any concert, dance, exhibition, cabaret or public show of any description in which or at which any person appears in a manner or attire as to expose to public view any portion of the pubic area, anus, or genitals, or any simulation thereof, or in which or at which any female person appears in a manner or attire as to expose to public view any portion of the breast below the top of the areola, or any simulation thereof.

A license issued under this section, unless sooner revoked, shall expire on December thirty-first of each year. The fee for any such license or for any renewal thereof shall not exceed one hundred dollars.

The provisions of this section shall be applicable seven days per week; provided, however, that no license under this section shall be granted to permit such activities, except an athletic game or sport, or motion picture exhibited at a drive-in theatre during the period from the last Sunday in April to the last Sunday in October, on Sundays or before one o'clock in the afternoon on Sundays, without the written approval of the commissioner of public safety, made in accordance with the provisions of this section, upon written application to the said commissioner accompanied by a fee of not more than five dollars, or in the case of an annual license by a fee of not more than one hundred dollars.

Amended by St.1935, c. 102, § 1; St.1936, c. 71, § 1; St.1981, c. 351, § 85; St.1981, c. 694, § 1.

APPENDIX E — RELEVANT UNITED STATES CONSTITUTIONAL AMENDMENTS

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

(The first 10 Amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights")

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

(Ratified July 9, 1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among

the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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* Changed by section I of the twenty-sixth amendment.

Appendix E

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.